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The Legal Response to Striking at the Individual Level in the Common Law Jurisdictions of Canada

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I. Introduction

It is universally accepted that in the economic battle of a strike each individual striking employee must bear the temporary loss of his income, subject to any assistance his union can give him in the form of strike pay. It is not, however, universally accepted that he should be penalized by losing his job and accrued claims to seniority and fringe benefits such as pension, severance pay, sick pay, vacations and holidays. This is particularly so in the case of a legal strike. The legal striker is, after all, merely a participant, and perhaps not even a willing participant, in the system espoused by labour relations law for settling the terms and conditions of employment. The full extent of the legal protections against such losses has received little attention in Canada, probably because most unions win reinstatement and "no-victimization" as part of any strike settlement. Such is not always the case, however, and where the union is weak and loses badly, the individual striking employees may be in jeopardy. It is with such employees that this paper is concerned.

After identifying more fully the employment interests threatened in a strike and considering the justification for protecting such interests, the law relating, first, to loss of job and, second, to loss of fringe benefits is examined in detail with suggestions as to how it should be reformed.

II. The Cause of the Problem: Expiry of the Collective Agreement

Canada has opted for a system of collective bargaining which embodies a rigid distinction between conflicts of right and interest and emphasizes the legal enforcement of the collective agreement through arbitration.[1] For a strike to be lawful the collective agreement, a subsequent process of conciliation and a waiting

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1. The best account is in H. Woods, *Labour Policy in Canada* (Toronto: Macmillan, 1973).

period must have expired, and when they do all that remains of the employment relationship is the bare skeleton of the employment contract fixing the wage/work bargain, which the employer is free to renegotiate by individual "bargaining" with his employees.[2] To the extent that he can give them notice of termination unencumbered by the "just cause" requirement of the collective agreement job security and fringe benefits are threatened.

Until the recent Supreme Court of Canada decision in *McGavin Toastmasters* v. *Ainscough*[3] the effect of a strike on the individual employment contract had received relatively little attention in Canada. The more fully elaborated English jurisprudence is, therefore, worth considering as a starting point, although the statutory framework of Canadian labour law renders much of the English contractual analysis inapplicable.

Analysts of the English law suggest that striking may have one of three effects on the employment contract.[4] The first suggestion is that the strike constitutes repudiation by the employee in which case he is liable to summary dismissal either when strike notice is given (treating the notice as an anticipatory breach) or at any time after the beginning of the strike on the theory that there is a fresh repudiation of his contract on each successive day the employee is absent.[5] Second, it is suggested that the strike constitutes an express or implied termination. In other words, the striker is treated as resigning when the strike begins and is no better off than under the first suggestion. Either way, the employer may refuse to re-engage him under a new contract when the strike ends. The third suggestion

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2. Under labour relations legislation in most Canadian jurisdictions the terms and conditions of employment under a collective agreement are "frozen" for the duration of the conciliation process and waiting period which must precede a legal strike. At the same time it becomes lawful to strike, the "freeze" lifts. See *infra*, note 73. The union which was party to the agreement will still have the exclusive right to bargain collectively with the employer, and may have some obligation to "bargain in good faith", but that does not prevent him from dealing individually with his employees.

3. (1975), 54 D.L.R. (3d) 1; 75 C.L.L.C. 15, 253 (S.C.C.).

4. See P. O'Higgins, *Legal Effect of Strike Notice* (1968), 26 Camb. L.J. 223; K. Foster, *Strikes and Employment Contracts* (1971), 34 Mod. L. Rev. 275; N. Lewis, *Strikes and the Contract of Employment*, [1968] J. Bus. L. 24. See also *Chappell v. Times Newspapers Ltd.*, [1975] I.C.R. 145 (C.A.), noted by R. Simpson, *The Impact on Industrial Law of Chappell v. Times Newspapers Ltd.* (1975), 49 Aust. L. J. 581. Limited protection against dismissal is afforded by the Trade Union and Labour Relations Act, 1974, c. 52, Schedule 1, para. 8 as am. by the Employment Protection Act 1976.

5. *Smithies* v. *NAOP*, [1909] 1 K.B. 310 at 335 (C.A.).

is that the contract of employment is merely suspended. The contractual nexus is preserved throughout the strike but the obligation to work and to pay wages (and perhaps other obligations as well) are suspended and, presumably, the employer's right to terminate by proper notice or wages in lieu thereof is also suspended, at least where his motive is to penalize strikers. On this view job protection is guaranteed.

The English courts have, in fact, adopted the first suggestion, the repudiation view of the law, except in cases where a strike notice has been held to constitute an express resignation or where the suspension doctrine has been held to have been expressly consented to by the parites.[6] With one exception,[7] English judges have rejected any suggestion that as a matter of public policy the suspension doctrine should be held to be incorporated in the contract of employment generally. They have thereby ignored the reality that strikes are an accepted incident of the continuing collective bargaining relationship between employer and employee.

In contrast the decision of the Supreme Court of Canada in the *Ainscough*[8] case establishes that in Canada striking employees do continue to be employees even where the strike is illegal. They are therefore protected against victimization, to some degree at least, by statutory provisions common to all Canadian jurisdictions which substitute the collective agreement and legislated rights for the often nebulous terms of a private contract of employment.

The facts in *Ainscough* were that the work force went on an illegal strike during the subsistence of a collective agreement to force negotiations over a planned discontinuance of part of the employer's bakery operations. The union did not notify the employer of the strike, and shortly after it began, the secretary of the union was advised that the plant had closed down. Article XX of the collective agreement entitled "full time employees" to severance pay, but the employer refused to make such payments on three grounds: that the strike meant that there was no "closure of the plant" within Article XX; that even if there had been a closure the strikers were disentitled because by striking illegally they had automatically terminated their contracts of employment prior to the

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6. Suspension presumably applies where strikes occur after compliance with an incorporated procedure under s. 18(4). Trade Union and Labour Relations Act 1974. c. 52 (U.K.).
7. *Morgan* v. *Fry,* [1968] 3 All E.R. 452 (C.A.) (*per* Lord Denning M.R.).
8. (1975), 54 D.L.R. (3d) 1 ;75 C.L.L.C. 15, 253.

closure or that by striking illegally the employees had repudiated their contracts, which entitled the employer to terminate them. The first ground was unanimously rejected at trial, in the Appeal Court and in the Supreme Court of Canada. "Closure" was interpreted as referring to closure by the employer, and that was what had occurred. Opinions differed on the other grounds.

Kirke-Smith J. at first instance,[9] Robertson J.A. in the Court of Appeal,[10] and de Grandpré J. in his dissent in the Supreme Court of Canada[11] accepted the "repudiation" analysis, although de Grandpré J. alone thought, on the facts, that the strikers' repudiation had been accepted by the employer. McFarlane and Seaton JJ.A., in the Court of Appeal, held the strike to be a non-repudiatory breach of contract giving rise to damages only.[12] In the Supreme Court of Canada, Laskin C.J.C., for the majority, rejected any such contractual analysis of the employees' rights. He said:[13]

> I do not think that in the face of labour relations legislation such as existed at the material time in British Columbia, in the face of the certification of the union, of which the plaintiffs were members, as bargaining agent of the specified unit of employees of the company and in the face of the collective agreement in force between the union and the appellant company, it is possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships. . . .
>
> The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto. . . .

On this analysis it is submitted that under Canadian law the jobs of striking employees are protected. If the strike is illegal as

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9. (1973), 36 D.L.R. (3d) 309 at 314 (B.C.S.C.).
10. (1974), 45 D.L.R. (3d) 687 at 698-705 (B.C.C.A.). Only he accepted the third ground, which is odd since he also thought that the repudiation had not been accepted as terminating the contracts. Surely refusal to perform further constitutes such an acceptance. See Seaton J.A. at 710-11.
11. (1975), 54 D.L.R. (3d) 1 at 9; 75 C.L.L.C. 15, 253 at 15, 257.
12. Damages are assessed at the value of each striker's own output less expense incurred in obtaining it, which are too small to make suing practical. See *Ebbw Vale Steel, Iron and Coal Co.* v. *Tew* (1935), 1 L.J. N.C.C.A. 284 (C.A.); *NCB* v. *Galley*, [1958] 1 All E.R. 91 (C.A.).
13. (1975), 54 D.L.R. (3d) 1 at 5-6; 75 C.L.L.C. 15, 253 at 15, 256.

occurring during a collective agreement, the contractual nexus remains intact so the requirement of "just cause" for dismissal under the agreement can be invoked. If the strike is legal, it is submitted that under the labour legislation of each Canadian jurisdiction there is statutory preservation of "employee" status which parallels the doctrine of suspension at common law. Where a strike is illegal because it occurs after the end of the collective agreement but before the exhaustion of statutory peace procedures the doctrine of suspension may have to be resorted to.

There are practical constraints as well on the power of employers to penalize striking employees.[14] The union may win the strike and secure reinstatement and "no-victimization" in the settlement (these are invariably bargaining priorities). Even if it loses, the labour market may force employers to retain the services of the employees; for example, where the market is "tight", or where the work force is large or relatively high-skilled. Further, employers do not want to "sour" future relations with their workers or a defeated union by taking a hard line. Thus the doubts about the legal position of participants in an illegal strike cause no problem for the strong, but where the union is defeated and there are no labour market constraints the legal protection is essential. The "weak" must not suffer injustice because of their weakness.

Even if the union wins the strike, it must ensure that the "no-victimization" clause is properly worded to avoid two pitfalls. First, it must specify that benefits accruing under the pre-strike agreement remain enforceable under the new one. Arbitrators' jurisdiction is limited to disputes arising from the agreement under which they are appointed, so that they can only hear grievances over benefits under the pre-strike agreement if the benefits are expressly preserved[15] in the new one. Second, in order to protect benefits in the hiatus between two agreements, the new agreement must contain a retroactivity clause providing that obligations under the pre-strike agreement are considered to have remained in force through the hiatus.[16]

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14. See *Royal Commission Inquiry into Labour Disputes* (Toronto: Queen's Printer, 1968) at 178 — "The Rand Report".
15. *Re USW and Int'l. Nickel Ltd.* (1970), 22 L.A.C. 286 (Weatherhill); *Int'l. BEW Local 579 and Berlet Electronics Ltd.* (1968), 19 L.A.C. 152 (Weatherhill); *Re UAW and Canadian Acme Screw and Gear Ltd.* (1964), 15 L.A.C. 351 at 362-63 (Little); *Re Sudbury Mine, Mill and Smelter Workers Union and Falconbridge Nickel Mines Ltd.* (1958), 9 L.A.C. 105 (Little).
16. *Re UAW Local 458 and Massey Ferguson Inds. Ltd.* (1966), 17 L.A.C. 396

III. Justifications for Protecting Employment Interests of Strikers

The justification for protecting strikers' employment interests must be considered from the viewpoints of the worker, his union and the "public interest".

For the worker, three considerations make it unfair that he lose his job and fringe benefits for striking. First, the strike may be a necessary component of the prevailing industrial relations system from which society benefits; second, the strike may be lawful *vis-a-vis* the union; third, the striker may have no practical option but to strike.

Canada has opted for collective bargaining as the chief institution of job regulation and a meaningful "right" to strike is essential for its existence. Societal values will determine the limits of the "right" to strike required to give any collective bargaining system its driving force, but once it is determined that a particular kind of strike is a necessary component of the system it is illogical and unjust to penalize any individual striker for participating. He should not bear the burden for action that is essential to the functioning of the society in which he finds himself and from which the public derives the benefits.

Second, if the union strikes lawfully it is illogical and inequitable that the same activity should be treated as unlawful on the part of the individual. The collectivity is the sum of its members. This should not prevent employers from terminating the employment of strikers by notice or wages in lieu thereof at common law but the law should at least require that the striker not be treated as having acted *unlawfully* in breach of contract when the strike is lawful on the collective plane.

Third, workers are under strong pressures to join strikes, including social ostracism, violence and expulsion from the union with loss of job in a union shop. The striker has no practical freedom of choice. He is faced with losing his job through striking or being driven from it by his workmates. This would not justify protecting strikers' jobs in *all* strikes but it is a reality weighing in

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(Little); *Re Int'l. Chemical Workers, Local 412, and Penick Canada Ltd.* (1966), 17 L.A.C. 296 (Weatherhill); *Re Service Employees' Union, Local 204, and Toronto Hospital for Tuberculosis* (1970), 22 L.A.C. 119 (Brown); *Re Truck Crane Services Ltd. and Int'l. Operating Engineers, Local 793* (1973), 4 L.A.C. (2d) 250 (O'Shea); *Re Sturgeon General Hospital and CUPE, Local 1335* (1974), 6 L.A.C. (2d) 360 (Taylor).

favour of protecting them where the strike action is contemplated as part of the functioning of the collective bargaining system.

For the union, to penalize its members is to commensurately reduce its bargaining power. While the desirable point of balance in the scales of bargaining power is a value judgment, it is nonetheless unjust and illogical to allow the union to strike lawfully when the same conduct is unlawful on the individual plane. This is to take away with one hand what the other gives! Moreover, given that the lawful strike is an essential component of the system, public policy should require that the union be allowed to conduct it effectively without having its position undercut on the individual level.

From the point of view of the "public interest", the lawful strike must be regarded as the power house of the industrial relations system from which society benefits. To permit the dismissal of those who participate in lawful strikes is destructive of the system and inconsistent with the public policy of promoting collective bargaining. The argument that laws protecting strikers would tip the balance of power too far in favour of employees and so destroy the effective countervailing power of management should be rejected. It erroneously assumes the present balance to be an absolute, whereas in fact it varies with circumstances and fluctuates daily. Indeed, to protect the job rights of individual employees would not augment the power of "strong" unions since their strength already appears to be protection enough for their members. It is the "weak" unions who suffer along with their individual members and because of their weakness effective collective bargaining may be severely impaired. Thus the promotion of sound collective bargaining in areas of union weakness would be assisted by protecting the jobs of individual strikers, and this is in the "public interest".

Any legislation providing such protection must be based on assessments of, first, *which* strikes are essential to the functioning of the system and, second, how it is to be determined *when* the worker is participating in them.

IV. Protections against Loss of Job

In all Canadian jurisdictions reliance is placed on legislation to protect the jobs of strikers. It is consistent with the Canadian system that protection be introduced by positive statutory intervention since the acceptance of a high degree of legal intervention by employers and unions in their affairs is part of the "common

ideology'' giving the system its unity, coherence and stability.[17] The terminological differences are examined later.[18] The common characteristic of the legislation in every Canadian jurisdiction is to give protection through two separate provisions. First, there are declaratory sections conferring ''employee'' status on strikers, which assure access to the enforcement sections where none might otherwise exist at common law. For example s. 1(2) of the Ontario Act provides:

> For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of a . . . strike.[19]

Second, there are enforcement sections making it an unfair labour practice to discharge employees for taking part in lawful strikes. Section 58 of the Ontario Act provides:

> No employer . . . (a) shall refuse to employ or continue to employ a person . . . because that person . . . was exercising any . . . rights under this Act . . . or (b) shall seek by threat of dismissal . . . to compel an employee . . . to cease to exercise any . . . rights under this Act.

Although the section speaks of ''person'', he must be an ''employee'' in order to be ''employed''. Section 1(2) therefore complements s. 58 by ensuring that strikers have ''employee'' status at the date of dismissal.[20] Since the Supreme Court of Canada in *Royal York* held participating in a lawful strike to be a ''right under this Act'', dismissal for lawful striking is prohibited.[21]

1. The Ambit of Legitimate Action: Which Strikes?

Canadian public policy as expressed in labour relations legislation permits striking only in the narrow confines of interest disputes after the expiry of the collective agrement and relevant statutory peace procedures. The enforcement sections have been interpreted to limit the individual's protection to the same area. The landmark case is *CPR* v. *Zambri,* known as the *Royal York* case.[22] The sole question

17. J. Dunlop, *Industrial Relations Systems* (New York: Holt, 1958) at 16-18.
18. *Infra* at 448.
19. *The Labour Relations Act,* R.S.O. 1970, c. 232.
20. ''Employee'' status is also required for the specific rights to reinstatement in the Ontario and Manitoba Acts. *Infra* at 453-54.
21. *CPR* v. *Zambri (Royal York)* (1962), 34 D.L.R. (2d) 654 (S.C.C.), *aff'g. (sub nom. R.* v. *CPR)* 33 D.L.R. (2d) 30 (Ont. C.A.), *aff'g.* 31 D.L.R. (2d) 209 (Ont. H. C.), *rev'g.* 61 C.L.L.C. 15, 732 (Mag. Ct.).
22. *Id.* and see generally H. Arthurs, ''The Right to Strike in Ontario and the

was whether a strike called in compliance with statutory procedures was a "right under this Act" within what is now s. 58(a) and (c) of the Ontario Act.[23] Magistrate Ellmore held that the term "right" in the statute referred to a common law "right"; that the right to strike had to be determined at common law irrespective of legislation and that there was no such right. In the Supreme Court of Ontario, however, McRuer C.J.H.C. re-affirmed the supremacy of legislation. He held that the statute, while not *creating* a "right" to strike (which ultimately had its source in common law) did give the status of employee to persons lawfully on strike, quite apart from the common law. This was followed in the Appeal Court and the Supreme Court of Canada upheld the decision on two lines of reasoning.

Judson J. (Abbott and Martland JJ. concurring) held that striking is a "right under this Act" wherever the statutory procedures are complied with irrespective of common law.[24] Locke J. followed this approach,[25] which denies any role for common law. However, Cartwright J. (Fauteux J. concurring) argued that the legality of strikes remains to be determined by common law, but that any breaches of contract (but not torts) are immunized by s. 1(2), which otherwise would be rendered nugatory, so that striking is a "right under this Act". It is submitted that it is circular to say that striking is a s. 58 "right" because s. 1(2) negates breach. The words "For the purposes of this Act" require the claimant to be exercising a "right under this Act" as a prerequisite of s. 1(2) status: surely s. 1(2) does not create something upon which it depends for its own existence!

Further, Cartwright J. thought that s. 1(2) of the Ontario Act immunized breaches of contract, in which case additional tort illegalities would stop the strike from being a "right under this Act". This is a dangerous view. It is a nice question whether Cartwright J. would have held s. 1(2) to immunize a breach of contract where the breach was also a component of a tort, or whether the breach, being a component of the wider tort, would

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Common Law Provinces of Canada" in *Proceedings of the Fourth International Symposium on Comparative Law* (Ottawa: University of Ottawa Press, 1967) at 187. See also R. Dunsmore, "The Employer, the Employee and the Legal Strike" (1973), 2 Queen's L.J. 3.

23. Text accompanying note 19, *supra*.

24. (1962), 34 D.L.R. (2d) 654 at 665.

25. *Id.* at 656-57.

defeat the immunity. The other judges did not consider the impact of tort illegalities, though the thrust of their judgments is that compliance with statutory procedures is all that counts. The effect of the majority decision is therefore to protect the job interests of individual strikers but to restrict that protection to interest strikes, called in accordance with the Ontario *Labour Relations Act.*

The legislation of all other jurisdictions reserves the protection of their equivalents of s. 58 of the Ontario Act to lawful strikes, with terminological variations,[26] and *Royal York* would therefore appear to be binding in all jurisdictions. Certain jurisdictions incorporate the decision in their legislation by gearing protection of individual job interests in strikes specifically to strikes which comply with statutory procedures. Thus, Alberta, Nova Scotia and the *Canada Labour Code* speak of strikes ". . . that are permitted by this Part", meaning those complying with the requisite procedures.[27]

In the "declaratory" equivalent of Ontario's s. 1(2) found in legislation of most provinces "employee" status is maintained regardless of the strike being illegal. The object appears to be to forestall the argument of the employer in *Ainscough.*[28] It is surprising that the British Columbia and New Brunswick statutes restrict such protection to "strikes . . . not contrary to this Act" and "lawful" strikes respectively. Even in those jurisdictions the legislation could be construed as giving protection unless a strike is in beach of statutory procedures, and thus not leaving the individual's position to be determined by the inappropriate notions of the lawfulness of the strike at common law.

2. *When is the Striking Employee Protected?*

Strikers' job interests are protected when the employer's principal reason for dismissal is to penalize them for participating in a lawful

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26. Industrial Relations Act, S.N.B. 1971, c. 9, s. 4(3); Labour Act, S.P.E.I. 1971, c. 35 as am. by S.P.E.I. 1973, c. 24, s. 9(1); *Labour Code,* R.S.C. 1970, c. L-1, s. 184(3) (a) (vi); *Alberta Labour Act, 1973,* S.A. 1973, c. 33, s. 153(3); Trade Union Act, S.N.S. 1972, c. 19, s. 51(3) (vi); *Labour Code of British Columbia Act,* S.B.C. 1973, c. 122, s. 3(2); The Labour Relations Act, R.S.N. 1970, c. 191, s. 4(2); *The Trade Union Act, 1972,* S.S. 1972, c. 137, s. 11(1) (A); The Labour Relations Act, S.M. 1972, c. 75, ss. 14(1) (b) ("rights") and 8(1) (b) and (g) ("rights" and "activities").

27. Trade Union Act, S.N.S. 1972, c. 19; The Labour Relations Act, S.M. 1972, c. 75. *Alberta Labour Act, 1973,* S.A. 1973, c. 33; The Labour Relations Act, R.S.N. 1970, c. 191.

28. (1975), 54 D.L.R. (3d) 1; 75 C.L.L.C. 15, 253.

strike. The major issue therefore is determining the employer's motive for dismissal. This issue presents itself differently where the dismissal occurs in the course of a strike than it does when the employee is effectively terminated at the end of a strike. Just when the "end of the strike" occurs is in itself often a difficult issue. The shortage of case law leaves many questions in these areas unanswered.

Strikers' jobs may be threatened (a) where they are dismissed during the strike, and (b) where they are refused reinstatement when the strike ends, which (c) involves a definitional problem to which particular attention must be directed.

(a). Dismissal During the Strike

In all Canadian jurisdictions it is an unfair labour practice for an employer to discharge lawful strikers and compulsory reinstatement as well as compensation may be ordered. Since the essence of the offence is the employer's motive he should bear the burden of proof, otherwise it will be virtually impossible for the employee to establish bad motive on a "balance of probabilities". Saskatchewan and Nova Scotia have recognized this by expressly reversing the burden by placing it on the employer.[29] The Nova Scotia reversal is wider in that it applies to penalties other than dismissal or suspension, for example, interference with fringe benefits and *threats* of discharge or suspension.[30] Other provinces may follow the traditional Ontario Board practice of making a *de facto* reversal where the employer's conduct is so inherently injurious to the employees' interests, as dismissal is, that it implicitly connotes bad motive. In *Sarich* v. *Corp. of the City of Sault Ste. Marie*[31] the Ontario Board appeared to depart from the traditional policy by insinuating that the striker carries the onus, but recent decisions revert to the traditional approach.[32]

Particularly difficult issues arise where the employer asserts the true reason for dismissal to be (i) "legitimate business reasons", or (ii) misconduct.

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29. *The Trade Union Act*, S.S. 1972, c. 137, s. 11(1) (c); Trade Union Act, S.N.S. 1972, c. 19, s. 54(3).
30. S.N.S. 1972, c. 19, s. 51(3).
31. [1974] O.L.R. B. Rep. 523.
32. *Retail Clerks Int'l. Association* v. *Little Bros. (Western) Ltd.*, [1975] O.L.R. B. Rep. 83 at 84.

(i) "Legitimate business reasons"

The Ontario Board has held the dismissal of strikers to be lawful where the employer's principal reason was neither "devoid of legitimate business purpose or lacking in significant business purpose".[33] The system recognizes the employer's "right" to reduce his work force because of adverse economic circumstances, notwithstanding that this coincides with a strike. However, there must be safeguards against employers hoodwinking boards by trumped-up claims of economic adversity.

First, boards should vigorously examine the employer's economic evidence and if the situation is not so "bleak" that a "reasonable company" would normally make such cutbacks, bad motive should be assumed. Second, if the adverse situation is self-induced, for example, where the employer refuses to take orders or cuts back on business in other arbitrary ways, bad motive should be assumed. Third, if the situation "miraculously" improves after the strike, especially if union activists are not re-employed, bad motive should be assumed. A conditional board order may be particularly useful in this context.[34] An example would be a board order provisionally accepting the employer's "legitimate reason" at the date of dismissal, but requiring him to return to the board if jobs subsequently become available and the strikers are not rehired.

The issue is more complex where the strike either directly or indirectly creates the adverse economic climate. It is submitted that where the adverse economic situation is caused by a confluence of factors, the strike not being the principal one, a dismissal is *prima facie* "legitimate". Where the strike is the principal factor the dismissal should be considered to be because of the strike and to be *prima facie* "illegitimate". The industrial relations system does not contemplate employees injuring their employer without his being allowed to defend himself. Part of the dynamics of striking is that the union must gauge how much pressure the firm can withstand before cutbacks are necessary. To protect against dismissal where strikers have miscalculated is to let them have their cake and eat it too. However, since all strikes involve some damage to the firm, there is a danger of abuse by employers and the above safeguards should be strictly applied.

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33. *Webster and Horsfall (Canada) Ltd.* (1969), 69 C.L.L.C. 16,050 (O.L.R.B.).
34. *E.g.* Trade Union Act, S.N.S. 1972, c. 19, s. 17(a).

Little illumination is provided by the only case to arise, *Webster and Horsfall*.[35] The business was divided into rope wire manufacturing and import-resale operations. The employer had decided sometime prior to the strike to close the manufacturing side (though the strike hastened it) and this evidenced "legitimate business reasons". However, his attempt to replace one striker in the import-resale side with a supervisor indicated bad motive since there was no run down of the import-resale business. The existence of such a prior decision is a useful indicator but should not, as a rule of law, excuse employers, because it could easily be abused by an employer who foresees a strike.

An interesting question is whether it is "legitimate" for employers to create a loss situation. Suppose an employer dismisses strikers because he wants a "quiet life" free from labour disputes and accepts that the reduction of his operations will cost money. His motive relates to striking, but the system surely contemplates him determining the scope of his business (though unions would press for a joint say).[36]

(ii) Misconduct

Employers should be allowed to dismiss strikers for certain misconduct but there must be safeguards against spurious allegations raised to cloak the employer's true motive. Labour boards are unlikely to apply common law standards of breach of contract and repudiation as these do not reflect industrial realities. *Dicta* suggest that the employment relationship preserved by the declaratory sections is a novel status one, not a contractual one, to which the contract standards are presumably inapplicable.[37] At the best they will probably accommodate industrial realities, as where employees were dismissed for organizing, outside their strict statutory "right" to participate in union activities.[38]

One test of employer motive in dismissing strikers is to utilize the "just cause" standards of grievance arbitration and say that there is

35. (1969), 69 C.L.L.C. 16,050.

36. In practice only firms with unsophisticated technological systems could do this. American courts probably permit dismissal. See *Textile Workers* v. *Darlington Co.* (1965), 380 U.S. 263 at 273-74.

37. *Royal York* (1962), 31 D.L.R. (2d) 209 at 219 (Ont. H.C.) (*per* McRuer C.J.H.C.); 34 D.L.R. (2d) 654 at 658 (S.C.C.) (*per* Locke J.) but *cf. id.*, at 666 (*per* Judson J.). See also, *Tung Sol* (1964), 15 L.A.C. 161 at 164 (Reville).

38. *E.g. USW of America and Rosco Metal Products* (1964), 64 C.L.L.C. 16,303 (O.L.R.B.).

a rebuttable presumption of bad motive if dismissal would not be for "just cause", the more so where the alleged cause of dismissal falls patently short of those standards. Even though the collective agreement will necessarily have terminated where there is a legal strike it is compatible with legislative policy that "just cause" standards apply during strikes. Given that legislation performs the function of the collective agreement during its temporary demise, and that it assumes a second agreement which will contain a "just cause" clause, the legislation appears to contemplate the *interim* period being governed as far as possible *as if* a collective agreement were in force. One formula adopted by arbitrators is to ask whether the misconduct is ". . . inimical to the continuance of the employer-employee relationship".[39] This formula, which enables the arbitrator to accommodate industrial realities, may now be examined in relation to picketing and sabotage, two problem areas of striker misconduct.

Dismissal for lawful picketing should be considered to indicate bad motive because picketing is established as a legitimate weapon which invariably accompanies strikes. Picketing involving obscure crimes and torts, short of "serious" illegality, such as violence and property destruction, should also indicate bad motive. It is undesirable that job rights depend on esoteric illegalities of which the worker cannot be expected to know. The normal practice of police and employers is not to initiate legal process unless "serious" illegality occurs.[40] Arbitrators have taken account of mitigating factors like a long, bitter strike causing latent explosiveness, deliberate provocation, drunkenness, previous warnings and prior service record.[41]

Protection should not apply to those who sabotage a plant, which is generally condemned and known to be unlawful. However, there must be safeguards against deliberate employer provocation. In *Inmont Canada*[42] the striker broke into the factory by stealth and

39. *Re Int'l. Chemical Workers, Local 412, and Penick Canada Ltd.* (1966), 17 L.A.C. 80 (Hanrahan); *Re Oil, Chemical and Atomic Workers, Local 9-341, and Inmont Canada Ltd.* (1970), 21 L.A.C. 411 (O'Shea); *cf. Re Canadian Gypsum Co. and N.S. Quarryworkers Union Local 294, CLC* (1960), 20 D.L.R. (2d) 319 (N.S.S.C.) (*per* Parker J.)

40. Arguably pickets should not suffer loss of job even then because adequate remedies are available under general civil and criminal law to compensate and exact retribution.

41. *Inmont Canada* (1970), 21 L.A.C. 411 (O'Shea); *cf. Penick Canada* (1966), 17 L.A.C. 80 (Hanrahan).

42. *Id.*

sabotaged the plant without doing serious damage. Although dismissal was for "just cause" the arbitrator did not clarify whether sabotage is ever excusable. Probably the strongest evidence of explosiveness and provocation is required for discharge not to be for "just cause".

(b). Refusal to Reinstate When the Strike Ends

Protection is available under general unfair labour practice provisions and, in Ontario and Manitoba, under the specific statutory right to reinstatement.

(i) General unfair labour practice provisions

Refusal to reinstate at the end of a strike is a ". . . refusal . . . to continue to employ" so that, in a sense, the right to reinstatement rests in the reversed burden of proof. Unless the employer establishes good motive there is an unfair labour practice entitling the employee to an order of compulsory reinstatement. The employer might argue that his motive is justifiable because, first, the system does not contemplate his having to expand his business to find room for displaced strikers, and, second, that it would be unfair to replacements who have been hired to displace them.[43] It is submitted that consistent labour policy requires that this argument be rejected.[44]

The plight of the replacements is a sorry one but not as sorry as that of strikers who are penalized for participating in action essential to the working of the system. The risk of displacement is the price of strike-breaking. If replacements choose to become allies of the employer they must accept the chance of being hurt. To place their interests above the strikers' allows for potentially great employer abuse. Further, the possible escalation of violence in picketing by strikers who see their jobs threatened by replacements is against the "public interest".

For strikers' displacement does not normally differ from simple dismissal. The employer's legitimate interest in continuing to operate during a strike only implies a right to hire *temporary* replacements.[45] Employers who have taken all practical steps to

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43. The Rand Report, *supra*, note 14 at 172-78 states that outside replacements were used in 29.4% of strikes where employers continued operations.
44. *Cf. Royal York* (1962), 34 D.L.R. (2d) 654 at 657 (*per* Locke J.).
45. Courts have recognized the employer's right but have not considered whether

find temporary workers and failed might argue that unless they could offer permanent jobs they would have to close down during the strike, but it is submitted that this argument must be rejected. The possibility of an employer having to close down is simply one of the variables in the balance of power, which he must consider before accepting a strike and part of the price he must pay in the interest of the industrial relations system. The point of balance is a value judgment and if strikers' legitimate claim to protection necessitiates closure, so be it! As yet no Canadian cases have been reported on this precise point.[46]

(ii) Special legislation in Ontario and Manitoba

Only in Ontario and Manitoba is there a specific statutory right of reinstatement irrespective of replacements, and it is a limited right. Section 11(1) of the Manitoba Act states that an "employee" who takes part in a lawful strike shall not be refused reinstatement in the job he held at the beginning of the strike provided: (a) the work he performed is continued after the strike and (b) a collective agreement has been reached settling the strike. The order of reinstatement, if not specified in the collective agreement or "other agreements",[47] shall be in accordance with seniority standing at the date the strike began.[48] The right is limited in that it only arises when a collective agreement is reached, which in practice means when the union has won. This ignores the plight of the defeated striker and gains nothing for the individual striking employee because no union could "sell" a package to its membership without guaranteeing recall!

Another deficiency of the Manitoba Act is s. 11(3) which enables employers to escape liability by proving that refusal to reinstate was

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it stops at temporary replacements. See *Christian Labour Association* v. *McLeod* [1969] O.L.R.B. Rep. 1100 at 1104. *Cf.* Locke J. in *Royal York, id.*, who intimates that the right extends to permanent replacement.

46. American courts have adopted the opposite position. *NLRB* v. *MacKay Radio and Telephone Co.* (1938), 304 U.S. 333. See *Replacement of Workers During Strikes* (1965-66), 75 Yale L.J. 630; J. Getman, *The Protection of Economic Pressure by Section 7 of the National Labour Relations Act* (1966-67), 115 U. Pa. L. Rev. 1195; G. Schatzki, *Some Observations and Suggestions Concerning a Misnomer — "Protected" Concerted Activities* (1969), 47 Texas L. Rev. 378.

47. This appears to erode the supremacy of the collective agreement as the exclusive code for the unit.

48. Presumably the reference is to seniority as it stood under the previous collective agreement, although it will in fact have terminated prior to the commencement of any legal strike.

for a just cause "which was not related to the strike . . . or any act in support of the strike". These words appear to preclude dismissal even for picket violence or "legitimate business reasons" brought about by the strike because the requirement is not that the cause of dismissal related *only* or *necessarily* to the strike. This extends protection beyond the limits of social justification.

Section 64 of the Ontario Act provides that an "employee engaging" in a lawful strike[49] who makes an unconditional application for reinstatement within six months of the commencement of the strike shall be reinstated in his former job on such terms as the employer and employee may agree upon, "except where persons are no longer hired to perform work of the same or similar nature". Section 64 also states that in the event of a "suspension or discontinuance for cause of the employer's operations, or any part thereof", if operations are resumed those who have made an application must be given preferential recall. This goes beyond the Manitoba "right" in that the statute applies where a collective agreement has not been reached. This gives protection where it is needed but there are shortcomings in the Ontario legislation too.

Foremost is the six month limitation which sets the parties a bargaining deadline. The union knows it must win within the limit or lose its less militant supporters, and employers are encouraged to "hang on" knowing their bargaining strength will improve. Strikes over six months do not necessarily result in a union "defeat" and it is presumptuous to assume that unions which cannot "win" within six months are undeserving of their membership's support. Time limits are arbitrary; realities can only be accommodated by a flexible standard like "until the strike ends".

A second shortcoming is the requirement that the striker make an "unconditional" application supported by individual "bargaining". This allows employers to dictate the terms of reinstatement subject only to the subsection (1) proviso that there must be no "discrimination" for the employee's exercise of "rights under this Act". There does not appear to be any requirement that employers observe terms at least as favourable as in the pre-strike collective agreement, which means that the price of "going it alone" which the employer can exact from a returning striker may be very high. It seems contrary to the spirit of collective bargaining legislation that

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49. *I.e.*, before a collective agreement is "executed", *Canadian Textile and Chemical Union* v. *Artistic Woodwork Co.*, [1974] O.L.R.B. Rep. 157.

employers should be allowed to exploit their unequal power over individuals in this way. It would be better to require reinstatement on terms not less favourable than in the previous collective agreement pending their renegotiation in the second collective agreement.

The third and perhaps most serious shortcoming of the Ontario Act is that, unlike employers in Manitoba, Ontario employers can unilaterally determine the order of recall, regardless of seniority, where there are several applicants and thus punish union militants.

(c). The Duration of the Strike

Obviously special protection for strikers' job interests should only apply for as long as the strike lasts. The common statutory formula is to declare that no person ceases to be an employee "by reason only of his ceasing to work for his employer as the result of a . . . strike". There are terminological differences. The legislation of Ontario,[50] New Brunswick,[51] Manitoba[52] and Prince Edward Island[53] confer employee status "for the purposes of this Act". The statutes of Nova Scotia,[54] Alberta,[55] Newfoundland[56] and the *Canada Labour Code*[57] substitute the words "within the meaning of this Act", but there appears to be no practical difference. The uniquely worded Saskatchewan Act, s. 2(f) (ii) states, "employee . . . includes any person on strike or lockout in a current industrial dispute who has not secured permanent employment elsewhere". Its significance is seen later. Only British Columbia and New Brunswick restrict the conferring of status to lawful strike situations, and in British Columbia *Ainscough* has negated some of the undesirable consequences.[58]

This remarkably imprecise formula has not been clarified. One test of when a person has ceased to be "on strike" and therefore an employee for statutory purposes was postulated in the Rand Report. The question to be asked is whether the parties' conduct is

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50. *The Labour Relations Act,* R.S.O. 1970, c. 232, s. 1(2).
51. Industrial Relations Act, S.N.B. 1971, c. 9, s. 2(2).
52. The Labour Relations Act, S.M. 1972, c. 75, s. 2(1).
53. Prince Edward Island Labour Act, S.P.E.I. 1971, c. 35, s. 8(2).
54. Trade Union Act, S.N.S. 1972, c. 19, s. 12(2).
55. *Alberta Labour Act, 1973,* S.A. 1973, c. 33 *Alberta 1973* s. 49(2).
56. The Labour Relations Act, R.S.N. 1970, c. 191, s. 2(2).
57. R.S.C. 1970, c. L-1, s. 107(2).
58. (1975), 54 D.L.R. (3d) 1; 75 C.L.L.C. 15, 253.

"incompatible with the basic purpose of the [labour relations] legislation",[59] but labour boards avoid these murky waters wherever possible. Wisely, boards relate the end of the strike to the circumstances of the individual striker rather than attempting to ascertain an objective end of the strike itself, as manifested by a resumption of normal work, for example. Thus in *McLeod*[60] although the strike lasted over seventeen months and normal production had been resumed, the Ontario Labour Relations Board held that eight of the ten strikers had not lost their status as employees. The other two lost status by taking permanent jobs elsewhere, not because the strike appeared effectively beaten. Any other approach is fraught with dangers where normal production is resumed by replacements. Those who stay out on strike should not be denied protection whether they number 5% or 95% of the original work force.[61]

If some employees were to stay out after a collective agreement was executed their dismissal would be justified not because the strike was "ended" but because their strike would then be illegal.

In applying such a test certain circumstances clearly negate employee status, such as death, resumption of work, formal resignation, contracting a disease disenabling further work, dismissal which does not constitute an unfair labour practice. The areas of greatest difficulty are where (i) the striker takes employment elsewhere, and (ii) replacements are hired.

(i) The striker takes employment elsewhere

It is established that temporary "moonlighting" is compatible with a continuing relationship and does not terminate status.[62] The Rand

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59. The Rand Report, *supra,* note 14. A similar approach was adopted in *Re Allanson* (1971), 17 D.L.R. (3d) 531 (Ont. H.C.), *aff'd* (1971), 20 D.L.R. (3d) 49 (Ont. C.A.), and underlies the *dicta* of McRuer C.J.H.C. in *Royal York* (1962), 31 D.L.R. (2d) 209 at 220 (Ont. H.C.) and in *McLeod,* [1969] O.L.R.B. Rep. 1100 at 1104. In *Re Allanson,* (1971), 20 D.L.R. (3d) 49 at 57, Arnup J.A. in the Court of Appeal intimated that strikers who have "retired" retain status. This is incorrect, it is submitted.

60. [1969] O.L.R.B. Rep. 1100.

61. The number of strikers must not fall below two because otherwise there will cease to be a "strike" within the statutory definitions. This leads to odd conclusions. For example, in a strike of three if one dies and the other quits, the remaining striker is unprotected.

62. *McLeod,* [1969] O.L.R.B. Rep. 1100 at 1105; *Beck and International Brotherhood of Bookbinders, Local 28* (1974), 74 C.L.L.C. 16,087 (O.L.R.B.). See the Rand Report, *supra,* note 14 at 23, 25 and 27.

Report recommended (reluctantly, one suspects) that this be law, and justified it on the ground that temporary "moonlighting" is equivalent in the balance of power to the employer's right to hire temporary replacements. This is a questionable notion because the variables affecting the balance are too diverse for one to be isolated as the exact equivalent to the other.

In determining whether the new job is "temporary" the test should be the striker's subjective intention. This does not mean that his testimony is conclusive. The onus of proof is, after all, on the striker to establish "employee" status as part of his unfair labour practice charge so that doubts as to the temporary nature of alternative employment are resolved against him.[63] Objective manifestations of his intent, no less than his credibility under cross-examination, are relevant as *proof,* but the legal standard should be his intent.

Relevant objective manifestations of intent include the relationship between striker and struck employer which indicates temporary employment, as where the employer pays vacations as they fall due,[64] or otherwise treats the striker as an employee for purposes of fringe benefits. Little reliance should be placed on statements to the second employer that the job is permanent for the striker may have to lie to get it. It is also relevant whether the striker has conducted himself as a permanent employee of the second employer, such as by accepting lengthy layoffs without changing jobs.[65] Overt "strike activities" such as picketing and maintaining contacts with the employer, the union and workmates, though emphasized in *Beck,*[66] are dangerous measures since many true strikers will show little interest whereas those who have left may remain active out of revenge or loyalty to ex-workmates. Finally, the nature of the second job would appear to be relevant. For example, a striking draftsman who took employment as a "bouncer" should not be readily assumed to have taken permanent employment.

(ii) Replacements are hired

In *Royal York* Locke J. may be interpreted as implying that the hiring of replacements terminates "employee" status on the ground

63. This is the effect of *dicta* in *McLeod, id.* at 1105 and *Beck,* 74 C.L.L.C. at para. 14.
64. As in *McLeod, id.*
65. As in *Beck* (1974), 74 C.L.L.C. 16,087.
66. *Id.* at para. 15.

that work has ceased because of something other than a strike, namely that replacements have taken over the jobs.[67] This seems incorrect since replacements may be regarded as increasing the numbers of the workforce rather than as substitutes for the strikers. In *McLeod*[68] replacements were considered relevant in establishing that the employer did not have an anti-union motive, but irrelevant for the purpose of determining if the strikers had employee status.

V. Protection of Fringe Benefits

In considering the vulnerability of strikers to loss of their entitlement to fringe benefits attention is here focused on pensions, seniority, holidays, vacations and sick pay. The legal protection afforded by statute or perhaps by any renewed collective agreement is considered in the case of each of these fringe benefits in turn. Finally, the notion of "incorporation" of rights arising under collective agreements into the private contract of employment is considered in this context. The question is whether the individual employee who has participated in a losing strike can rely on his individual contract of employment to claim fringe benefits established under a collective agreement which has terminated.

1. Pensions

The employer's obligation to continue paying into a pension fund arises from the collective agreement and therefore ceases upon its expiry.[69] Further, given the theory that most pensions are contracts subject to the condition that the employee continue in service until a future "vesting" date, employees are generally not entitled to any benefits. Nor, if the strike occurs before "vesting", are employees entitled to recover any part of the employer's contributions (unjust enrichment might be raised as an argument) although they probably can recover their own.[70]

Penalizing strikers in respect to non-vested pension benefits may be an unfair labour practice contrary to the prohibition against discrimination "in regard to any term or condition of employment"

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67. *Royal York* (1962), 34 D.L.R. (2d) 654 at 657 (S.C.C.).
68. [1969] O.L.R.B. Rep. 1100 at 1104-5.
69. *Re Coulter Manufacturing Ltd. and UAW, Local 222* (1973), 1 L.A.C. (2d) 426 at 430 (Weatherhill).
70. Generally, see J. Fichaud, *Pensions: A Primer for Lawyers* (1975), 2 Dalhousie L.J. 369.

in s. 58(a) of the Ontario Act and its counterparts. However, there can be no liability if all employees are penalized equally and no cases have arisen so far.

In six Canadian jurisdictions it is specifically made an unfair labour practice to deprive lawful strikers of pension benefits. The *Canada Labour Code,* s. 184(3) (d), is typical, providing that no employer shall

> . . . deny to any employee any pension rights or benefits to which the employee would be entitled but for (i) the cessation of work . . . as the result of a . . . strike not prohibited by this Part.

It is submitted that "or benefits" refers to "pension benefits" not to other "benefits" such as seniority. A pension "right" is not the same as a pension "benefit". The former connotes a "vested" pension whereas the latter refers to accrued but non-vested benefits. The Saskatchewan Act, s. 11(1) (1) (ii), protects *all* benefits by referring to "pension rights or benefits *or any benefit whatsoever.*"

Striking can affect the accrual of benefits under schemes that are preserved after the strike. If benefits accrue with "time worked" strike periods do not count unless the worker makes up the full contributions.[71] If they accrue with "continuous employment" time on strike should be counted since the employment relationship is preserved throughout, although employers should not have to make up their contributions unless the scheme so provides.

The "freeze" provisions of Canadian labour relations statutes preclude unilateral "alteration"[72] of terms and conditions of employment by an employer or union until the peace procedures have been exhausted.[73] One way to protect pension benefits and other fringe benefits would be by extending the "freeze" until the execution of a second collective agreement. Strikers' benefits would then be protected unless the union was forced to accept loss or reduction of benefits in the new collective agreement. The "freeze" would, of course, have to be a modified one so that there would be no continuing obligation to pay wages.

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71. See *Re UAW Local 397 and Norton of Canada Ltd.* (1969), 20 L.A.C. 195 (Brown). This was an absence case, though the principle would be the same as in strikes.

72. There is no "alternation" if the change is part of a past pattern so that it "would have happened anyway": *United Radio, Electrical and Machine Workers* v. *Beaver Electronics Ltd.*, [1974] O.L.R.B. Rep. 120. This, of course, is open to abuse.

73. *E.g. The Labour Relations Act,* R.S.O. 1970, c. 232, s. 70(1).

2. Seniority

No province specifically protects the seniority of strikers other than by general unfair labour practice provisions. As mentioned above, the Saskatchewan Act by s. 11(1) (1) (ii) does preclude changes in "any other benefit whatsoever" because an employee exercises rights under the Act but does not appear effective to prevent employers from disregarding seniority.

However, generally time on strike is to be counted in the computation of seniority under any new collective agreement subsequent to the strike. Arbitrators regard this as important to employees, holding that only "very clear"[74] language will allow strike periods to be discounted.

3. Holidays

Holidays may be provided in the collective agreement or under "floor of rights" legislation and it would appear that striking employees may lose holidays in three ways: (i) where the employer withdraws such non-vested benefits after the agreement ends; (ii) by strikers not having "employee" status at the date of the holiday, a common requirement in agreements; (iii) by the "day before — day after" rule common to agreements.

Holidays have been held to "vest" in one arbitration case[75] so that they are enforceable by trust after the expiry of the collective agreement. The arbitrator solved the problem of how much work was needed for the holiday to "vest" by requiring the employee to work his last shift after the last preceding holiday provided for in the agreement. If this decision is correct, the withdrawl of the holiday benefit would be unlawful. However, payment for a holiday normally depends on the employee working both the shift preceding and the shift following the holiday. If there is a strike on one or both of these days, and the agreement states them to be normal working days, the holiday will be lost.[76]

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74. *Tung Sol* (1964), 15 L.A.C. 161 at 162, 164-65.
75. *Re TCF of Canada and Textile Workers' Union of America, Local 1332* (1973), 1 L.A.C. (2d) 382 at 384 (Adell). "Vesting" would be impossible under the indemnity explanation of holidays. *E.g. Re Sudbury General Workers' Union, Local 902 and Silverman and Sons* (1967), 18 L.A.C. 224 (Weiler).
76. The words of the agreement are important and may vary. See *Re USW, Local 6299, and American-Standard Products Ltd.* (1968), 20 L.A.C. 18 (Palmer); *USW, Local 5656, and Hilton Mines Ltd.* (1967), 18 L.A.C. 211 (Lalande).

A common feature of legislation providing for minimum holidays is that striking does not necessarily disentitle workers. For instance, in Ontario, strikers would only be disentitled if the strike lasted longer than twelve "working days" during the thirty "calendar days" immediately preceding the holiday.[77] The Ontario legislation also has a "day before — day after" rule[78] similar to that found in most collective agreements. Unlike Ontario, Nova Scotia disentitles employees engaged in "continuous operations" who refuse to work on a holiday when directed by their employer.[79]

4. Vacations

For an employer to unilaterally postpone vacations falling due during a strike might constitute an unfair labour practice if the time of the vacations had been fixed by some binding agreement. This would be unlikely, however, since the collective agreement would normally be the vehicle for such an agreement and would have terminated prior to any legal strike. Where the employer has the right to unilaterally fix vacation times, failure to grant a vacation would, of course, be unexceptionable. In any case vacation pay is "deferred wages" that would have been earned up to the time of the strike. If there is a new agreement following a strike it has been held that the strike period counts toward the accrual of the next vacation unless the agreement states otherwise.[80]

Under legislation providing for minimum vacations striking would not *ipso facto* negative vacation rights but would affect the amount of vacation pay where it is calculated by work actually performed.[81]

5. Sick pay

The expiry of the collective agreement has been held to permit

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77. *The Employment Standards Act, 1974*, S.O. 1974, c. 112, s.26(1) (b). See also, for example, the Labour Standards Code, S.N.S. 1972, c. 10, s. 40(1) (a).
78. Section 26(1) (c).
79. Sections 39(1) and 40(3).
80. *Re Sudbury Mine, Mill and Smelter Workers, Local 598, and Falconbridge Nickel Mines* (1971), 22 L.A.C. 243 (Weiler) where vacation rights were based on a "working year", but see *Re USW and Welmet Inds.* (1969), 20 L.A.C. 431 (Weatherhill) where vacation rights were based on "active employment".
81. *E.g.* in Ontario, the amount of payment must not be less than 4% of the employee's earnings in the preceding twelve month period so that absence on strike decreases the amount of vacation pay.

employers to disentitle strikers from accrued benefits.[82] This could work real hardship in a case of accumulated sick benefits intended to afford a long-serving worker a large number of sick days to cover the long illnesses that become more likely with advancing age.

Where there is a new collective agreement an employee who was still off sick at the time of the signing of the new agreement would undoubtedly be covered but strikers are probably not entitled to payment for illness coinciding with the strike unless the agreement states otherwise. The traditional function of sick pay is to insure against work lost through illness, not through strikes. Since the striker would not have worked anyway, he will have suffered no additional loss by being ill. Workers have been disentitled on this ground where illness coincided with lay-off,[83] but the point remains open with regard to strikes.

6. Severance pay

The Ontario Divisional Court has recently rejected the notion that severance benefits "vest" so as to be enforceable as "property" interests through trust after the collective agreement expires.[84] This accords with the terminology of most schemes which is inconsistent with trust.

The common feature of legislation[85] providing for severance benefits is that such benefits are not payable where closure is caused by a labour dispute.[86] However, a recent Ontario employment standards determination has held[87] that severance benefits under the *Employment Standards Act* do not apply where closure coincides with a strike on the ground that the words ". . . a person who has been employed for three months or more"[88] at the date of closure

82. *IUOE, Local 700, and City of Hamilton* (1963), 13 L.A.C. 235 (Reville).
83. See *Re Price (Nfld.) Pulp and Paper Ltd. and International Brotherhood of Pulp, Sulphite and Papermill Workers, Local 63* (1973), 1 L.A.C. (2d) 69 (Harris).
84. *Re Telegram Publishing Co. and Zwelling*, [1974] 1 O.R. (2d) 592 (H.C.).
85. All provinces save British Columbia and New Brunswick provide statutory minimum notice requirements for layoff (or wages in lieu) and minimum severance payments.
86. Termination of Employment Regulations, R.R.O. 1970, Reg. 251, s. 3.
87. *Re Telegram Publishing Co. and William Cornish* (1973), 1 L.A.C. (2d) 29 (Carter).
88. *Employment Standards Act*, R.S.O. 1970, s.13(1). (Now see s.40(1), S.O. 1974, c. 112, where "employee" has been substituted for "person".) *Re Allanson* (1971), 17 D.L.R. (3d) 531, where "employee" status under s. 1(2) of the Ontario *Labour Relations Act* was held to apply as a non-Act purpose, *i.e.* a private pension scheme.

contemplates an *earning* relationship, not "employee" status under s. 1(2) of the *Labour Relations Act*. This decision neither concurs with the wording nor the policy of the Act. The purpose of s. 2(d) of the Regulations which disentitles those laid-off or terminated ". . . during or as a result of a strike . . . at his place of employment" is to cover lay-offs either caused by the workers in question striking or by strikes of their colleagues, *not* to impose a blanket disentitlement every time a strike coincides with a redundancy situation. Otherwise employers, planning redundancies, could provoke stoppages so as to drive a coach and four through the Act! Rather, strikers compete with wage earners in the same labour market and therefore equally need the Act's protection. The fact that s. 1(c) uses "*has been*", suggesting that the qualifying period may be worked *before* the strike, and that the length of "advance notice" is based on the number of persons laid-off rather than length of service, makes the decision a surprising one.

7. The Incorporation Theory: a Residual Common Law Element.

The traditional form of the incorporation theory[89] is that certain provisions of the collective agreement are incorporated *during its currency* into the private employment contracts of those bound by the collective agreement and remain enforceable as part of the private contract of employment of each of them after the collective agreement ends. The Supreme Count of Canada decision in *Ainscough*[90] casts grave doubt on the validity of this approach. Laskin C.J.C. held that the private contract of employment does not co-exist with the collective agreement and it would appear to follow that the collective agreement provisions not be incorporated into anything during the currency of the collective agreement. This does not prevent incorporation *after* the collective agreement ends, by the parties expressly or impliedly "referring back" to it as the source of employment conditions to clothe the bare work/wage bargain which is all that remains after the expiry of both the collective agreement and the provisions of the applicable labour relations statute which "freezes" wages and working conditions until a strike becomes legal.[91] On this theory incorporated terms can

89. See B. Adell, *The Legal Status of Collective Agreements in England, the United States and Canada* (Ontario: Queen's University Industrial Relations Center, 1970) at 203-27.

90. (1975), 54 D.L.R. (3d) 1; 75 C.L.L.C. 15,253.

91. Incorporation by "reference back" was contemplated by Fraser J. in *Re*

outlive the terminal date of the collective agreement,[92] but it is submitted nevertheless that the incorporation theory should be rejected.

The major drawback of the theory is that it is ineffective without a doctrine of suspension. The "employee" status of lawful strikers under labour relations legislation, whilst it parallels common law suspension, arguably only does so for the specific statutory purposes.[93] Otherwise, the English experience suggests that suspension at common law is exceptional.[94] Indeed, there are good reasons for Canadian courts not including the incorporation theory within the statutory purposes. The thrust of Canadian collective bargaining legislation is to exclude common law technicalities from the statutory framework,[95] whereas incorporation infuses a minefield of uncertainties into it. For instance, it is doubtful that a grievance procedure is suitable for incorporation from a collective agreement as a term of an employment contract[96] which would mean that there is no machinery for enforcing other incorporated provisions, unless courts usurp the arbitrators' function (which they seem reluctant to do).[97] Indeed, it would appear to offend privity

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Telegram Publishing Co. Ltd. and Zwelling, [1974] 1 O.R. (2d) 592 at 622, 624.

92. See *Denis* v. *Galway Realty*, [1973] 3 O.R. 15 (Co. Ct.). *Cf. Ferguson* v. *Bd. of Education for the City of Toronto*, [1972] 3 O.R. 587 (H.C.).

93. *Cf. Re Allanson* (1971), 17 D.L.R. (3d) 531.

94. *Supra* at 441-42.

95. This is the thrust of *Royal York, supra,* note 21 and *Ainscough* (1975), 54 D.L.R. (3d) 1; 75 C.L.L.C. 15,253.

96. In *Re Telegram Publishing Co. Ltd. and Zwelling*, [1974] 1 O.R. (2d) 592, Fraser J. held that collective agreement provisions that do not "directly relate" to the individual employment relationship are unsuitable for incorporation. The only case in favour of incorporation is *Re Prince Rupert Fishermen's Co-op. Assoc.* (1968), 68 C.L.L.C. 14,079 (B.C.S.C.), disapproved in *Zwelling*. American courts do not favour its incorporation: *Procter & Gamble Ind.* v. *Procter & Gamble Mfg. Co.* (1962), 312 F 2d 181 at 184-85. For the English position see K. W. Wedderburn, *The Worker and the Law* (2d ed. Harmondsworth: Penguin, 1971) at 193-96.

97. *E.g. The Rights of Labour Act*, R.S.O. 1970, c. 416, s. 3(3), the policy of which underlies *Hamilton Street Railway Co.* v. *Northcott* (1966), 58 D.L.R. (2d) 708 (S.C.C.); *Close* v. *Globe and Mail* (1967), 60 D.L.R. (2d) 105 (Ont. C.A.); *Tkach* v. *Comstock Int'l. Ltd. Allied Hydro Council of Manitoba* (1973), 36 D.L.R. (3d) 626 (Man. Q.B.); *Acadia Pulp and Paper Ltd.* v. *Int'l. Brotherhood of Pulp, Sulphite and Papermill Workers* (1971), 15 D.L.R. (3d) 227 (N.B.S.C., Q.B.); *Cummings* v. *Hydro-Electric Power Commission of Ontario* (1966), 54 D.L.R. (2d) 583 (Ont. H.C.); *Shank* v. *KVP Co.*, [1966] 2 O.R. 847 (H.C.) (*per* Brooke J.); *Drogt* v. *Robson-Lang Leathers Ltd.*, [1971] 3 O.R. 488 (Co. Ct.); *Ford* v. *Trustees of Ottawa Civic Hospital*, [1973] 3 O.R. 437 (H.C.) (*per*

that a union which is not party to the employment contract, but without whose co-operation the grievance procedure is inoperable, be obliged to co-operate. It is improbable that courts would imply a term in the contract of union membership that the union consents to process such grievances because of the difficulties involved.[98] Further, lawyers would have a field day in arguing whether there has been an implied "reference back". (Express "reference back" is rare since employers are unwilling to relinquish bargaining weapons with a strike imminent). Whereas the minimum flesh and blood clothing the contractual nexus upon expiry of the collective agreement "freeze" could be the fundamental provisions on wages and hours under which work is continued, it is more debatable in which circumstances the less commonplace provisions on seniority, sickness, severance, holidays and pensions could be said to have been impliedly incorporated. Presumably no implied "reference back" would be possible if an employer unilaterally dictates fresh terms without any work interceding after the expiry of the collective agreement/"freeze"; so too if an employer simply declared terms of employment to be subject to negotiation. Clearly implied "reference back" is inapplicable where the strike coincides with the expiry of the agreement/"freeze" without *any* interceding work. For these reasons it is inadvisable for Canadian courts to develop a suspension doctrine for the purpose of reinforcing the incorporation theory.

VI. Conclusion

All provinces have accepted the social justification of protecting the fringe benefits and jobs of strikers, thereby assisting the growth of sound collective bargaining in areas of union weakness, provided that the strike in question is essential to the functioning of the

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Leiff J.). *Cf. Adcock* v. *Algoma Steel Corp.* (1968), 70 D.L.R. (2d) 246 (*per* Grant J.); *Re Grottole and Lock* (1963), 39 D.L.R. (2d) 128 (Ont. H.C.); *Fergusson* v. *B'd of Education for City of Toronto,* [1972] 3 O.R. 587 (H.C.); *Woods* v. *Miramichi Hospital* (1967), 59 D.L.R. (2d) 290 (N.B.S.C.); *Logan* v. *Board of School Trustees* (1974), 40 D.L.R. (3d) 152 (N.B.S.C., A.D.). See the Court's wide power to interfere under the B.C. *Labour Code,* s. 108(b), *e.g.* Valley *Rite-Mix* v. *Teamsters Local Union 213,* [1975] 1 W.W.R. 685 (B.C.C.A.).

98. For example, non-unionists would presumably be unprotected and courts would surely wish to avoid entangling themselves in union rule books. Further, to incorporate the procedure assumes the employee has the right to unilaterally activate it which denies the union's interest in "screening" disputes and over-extends the duty of fair representation.

industrial relations system in the sense of being lawful under labour relations legislation. This is achieved by legislation conferring "employee" status on lawful and unlawful strikers (the latter secured by *Ainscough*[99]) and making it an unfair labour practice to dismiss them or to discriminate against them in regard to terms and conditions of employment because they strike. Also, certain provinces have reinforced protection by additional specific unfair labour practices. The following recommendations are suggested for the administration of the law relating to dismissal and fringe benefits.

Dismissal

1. Because motive determines liability, labour relations boards in provinces not having a statutory reversal of the onus of proof, should follow the Ontario board practice of operating a *de facto* reversal in cases of dismissal.

2. The safeguards of requiring strong economic evidence and of the conditional order should be utilized to forestall employer abuse of the "legitimate business reasons" proviso.

3. Where misconduct is alleged to be the principal reason for dismissal, boards should accommodate industrial realities by analogising with the standards of "just cause" in grievance arbitration. In particular, unlawful picketing should not warrant dismissal unless "serious" illegality is involved, and even then there may be mitigating factors.

4. Hiring replacements should not justify dismissal even though only permanent ones are available so that the employer has to close down. This could be achieved by legislative provision of a right to reinstatement, but those should not be modelled on the defective provisions in Ontario and Manitoba.

5. In determining the duration of strikes, attention should be focused on the circumstances of the individual strikers, not on the objective "death" of the strike itself. In particular, where strikers "moonlight" strong evidence that the second job is intended to be permanent should be required.

Fringe benefits

The general unfair labour practice against "discrimination" in

99. (1975), 54 D.L.R. (3d) 1; 75 C.L.L.C. 15, 253.

regard to terms and conditions of employment is defective where *all* strikers are penalized. One alternative is to have an unfair labour practice geared to specific fringe benefits as six jurisdictions already have in respect to pensions. Another is to extend a modified statutory "freeze" pending the execution of the second collective agreement. The incorporation theory, it is submitted, should be rejected as being inconsistent with the statutory framework of collective bargaining and because it creates a minefield of uncertainties.