SOME THOUGHTS ON THE PEACE OBLIGATION

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> [A]s soon as we begin to examine the economic system from a human point of view . . . the difficulty is to understand not why unrest and strikes exist, but why they are not more prevalent.[1]

The compulsory peace obligation, which prohibits industrial action during the currency of the collective agreement, is a central pillar of Canadian labour relations law.[2] The purpose of this paper is to evaluate the role of the peace obligation in the industrial relations system. Part I considers the existing legislation governing the peace obligation and suggests that, in most provinces, these legal parameters are too inflexible to permit a satisfactory accomodation of the underlying policies espoused by the present labour relations system. Part II questions the acceptability of the compulsory peace obligation, especially in light of its ideological assumptions, and discusses the pressures which are forcing readjustments to its traditional role. In conclusion, it is submitted that the system should expand the scope of permissible industrial action during the lifetime of the collective agreement. Several possible models are formulated to that end.

I. THE PRESENT AMBIT OF THE PEACE OBLIGATION

With the exception of Saskatchewan,[3] labour relations legislation in all jurisdictions prohibits industrial action during the currency of a collective agreement. In Alberta,[4] British Columbia,[5] Prince Edward Island,[6] Ontario[7] and Quebec,[8] the peace obligation is "absolute", in

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[1] G. COLE, CHAOS AND ORDER IN INDUSTRY 6 (1920).

[2] *See* Giugni, *The Peace Obligation*, in INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 127 (B. Aaron & K. Wedderburn eds. 1972) for a comparative view of the peace obligation.

[3] The Trade Union Act, R.S.S. 1978, c. T-17, s. 11(2)(*b*) makes it an unfair labour practice for any "person" to participate or persuade an employee to participate in a strike while any matter is pending before a conciliation board or the Labour Relations Board. S. 11(2)(*d*) makes a strike vote a prerequisite of a lawful strike. The Minister of Labour has the discretion to appoint a conciliation board under s. 22(1) of the Act.

[4] The Alberta Labour Act, 1973, S.A. 1973, c. 33, s. 132 (replacing R.S.A. 1970, c. 196).

[5] Labour Code, R.S.B.C. 1979, c. 212, s. 79(1).

[6] Labour Act, R.S.P.E.I. 1974, c. L-1, ss. 35(1), 40(3).

[7] The Labour Relations Act, R.S.O. 1970, c. 232, ss. 36, 63.

[8] Labour Code, L.R.Q. 1977, c. C-27, s. 107.

that strikes and lockouts over all issues are illegal during the prescribed minimum duration of the collective agreement, normally one year. In Ontario and Prince Edward Island, the parties to a multi-year agreement can acquire a lawful strike/lockout position prior to the expiry of the full term only if the agreement contains an early termination procedure. Thus the parties can provide, for instance, that failure to revise consensually specified items gives either side the option to activate the early termination procedure; in this case the agreement expires by its terms and sanctions can be imposed upon the expiry of the conciliation "freeze" period.[9] In British Columbia, section 66(2) of the Labour Code permits either party to apply to the Minister for consent to serve notice of early termination on the other party. An application can only be made after the agreement has been in force for at least eight months, and if consent is granted, termination can only occur on the next anniversary date of the agreement. Since 1974, only two applications have been filed, both of which were denied.[10] The infrequency of applications is probably explained by section 66(3) which permits the parties to contract out of the subsection (2) procedure in their agreement. Many collective agreements contain such provisions.[11] In Quebec and Alberta, the parties are bound to the full term of the agreement.

In the remaining jurisdictions, the peace obligation is "qualified" in that the parties can designate certain provisions in the agreement as subject to being re-opened. In the event of failure to agree on the designated items, the parties can acquire a lawful strike/lockout position upon exhaustion of the relevant statutory peace procedures. In Nova Scotia,[12] New Brunswick,[13] the federal jurisdiction[14] and Newfoundland,[15] the right to strike/lockout applies only to the designated items, so that the remainder of the collective agreement continues in force, subject to mutual amendment in writing by both parties. In Manitoba,[16] failure to agree on designated items gives either side the option to serve notice to terminate the entire agreement, so that the right to strike/lockout applies to all terms and conditions of employment.

Saskatchewan is unique since the labour relations legislation permits the parties to strike/lockout at any time during the collective agreement, unless the agreement contains a negotiated peace obligation. It is therefore permissible for the parties to draft a qualified peace obligation

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[9] *See* Kroehler Mfg. Co. v. Upholsterers, Local 199, [1976] Ont. L.R.B.R. 525, for a discussion of the requirements for an early termination clause.

[10] This is the situation as of 30 Nov. 1979, as confirmed in a letter of that date from Mr. A. Williams, Minister of Labour, to the author.

[11] *Id.*

[12] Trade Union Act, S.N.S. 1972, c. 19, ss. 45, 46.

[13] Industrial Relations Act. R.S.N.B. 1973, c. I-4, s. 91(3).

[14] Canada Labour Code, R.S.C. 1970, c. L-1, ss. 147(2), 180, *as amended by* S.C. 1972, c. 18, s. 1.

[15] The Labour Relations Act, S.N. 1977, c. 64, s. 95(2).

[16] The Labour Relations Act, S.M. 1972, c. 75, ss. 54(3), 77.

which will enable them to designate items as subject to re-opening with a right to strike/lockout, or to exempt certain conduct from the definition of proscribed action: for example, stoppages pursuant to hot cargo declarations, non-affiliation clauses and honouring picket lines.

Lastly, the peace obligation is further "qualified" in British Columbia,[17] Manitoba[18] and the federal jurisdiction[19] in that the parties may acquire a lawful strike/lockout position where defined technological changes occur during the lifetime of the agreement and certain statutory procedures are complied with. Although the Saskatchewan legislation contains technological change provisions similar to those in the other jurisdictions, it is probable that the right to strike/lockout does not arise under those provisions where the collective agreement contains a voluntary peace obligation.[20] Before attempting to evaluate the function of the peace obligation, it is necessary to re-state some of the basic philosophies underlying the Canadian industrial relations system.

A. *The Philosophies of the System*

Foremost among these philosophies is the common acceptance of collective bargaining as the most desirable institution of job regulation. There are three basic reasons for this preference.

First, collective bargaining historically was seen as eradicating the most blatant economic abuses of *laissez-faire* capitalism. It enabled workers to increase their economic benefits and standard of living to a level which was "tolerable" to most sections of society. Today this rationale still holds true. The process enables workers to receive a "fair" day's wage for a "fair" day's work.[21] Moreover, in addition to rules regulating market relations, collective agreements have progressively widened the scope of rules regulating managerial and environmental relations. Prevailing societal values reject the notion that persons exercising power over others may do so without restraint. Thus collective agreement provisions restricting the scope for arbitrary employer decision-making in areas such as discipline, discharge, promotion and health and safety are welcome to most sections of society. The fact that "fairness" is ultimately determined by the use, or threatened use, of economic force is rationalized in the negative: there are no other "fair" criteria or institutions for making the determination.

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[17] Labour Code, R.S.B.C. 1979, c. 212, ss. 74-78, which are discussed at pp. 598-600 *infra*.

[18] The Labour Relations Act, S.M. 1972, c. 75, ss. 72-75, which are discussed at pp. 598-600 *infra*.

[19] Canada Labour Code, R.S.C. 1970, c. L-1, ss. 149-153, *as amended by* S.C. 1972, c. 18, s. 1. These are discussed at pp. 598-600 *infra*

[20] The Trade Union Act, R.S.S. 1978, c. T-17, s. 43, which is discussed at pp. 598-600 *infra*.

[21] *See* R. HYMAN & I. BROUGH, SOCIAL VALUES AND INDUSTRIAL RELATIONS, A STUDY OF FAIRNESS AND INEQUITY (1975) which incisively examines the concept of "fairness" in industrial relations.

Secondly, and often understated, collective bargaining infuses *bilateral* job regulation into the work place. The hallmark of collective bargaining, which distinguishes it from other forms of job regulation, is that union and management are joint authors of the rules governing the work place. This process of bilateral rule-making is acceptable to most sections of society. It reflects the growing public consensus that persons who will be substantially affected by decisions of social and political institutions should be involved in the making of those decisions.[22] Whenever union and management bargain collectively over whatever item, the process is necessarily "political" in the sense of potentially readjusting management's power over the work force. The parallel is commonly drawn between political "democracy", in which members of the public share in governmental rule-making through political parties, and industrial "democracy", in which workers share in rule-making in the work place through trade unions.[23] Moreover, the notion that collective bargaining replaces the mythical "freedom to contract" under the individual employment contract with a *real* collective "freedom to contract" under the collective agreement, complements the widespread public acceptance of free enterprise economy. Whereas legal regulation of the procedural machinery for collective bargaining is extensive, the law has not intervened substantially in the substance and content of collective agreements. The notable exception is the recent anti-inflation legislation which has been generally rationalized as necessary to ensure "responsible" collective bargaining, with "responsibility" gauged in terms of reducing the balance of payments deficit and minimizing inflation. Thus the accepted view is that the maximization of joint control and collective freedom of contract is of intrinsic worth; however, when this transgresses the boundaries of the public interest, the process becomes "irresponsible" and requires legislative control.

The third reason for the widespread acceptance of collective bargaining is that the process supposedly "institutionalises" conflict at work. The pluralist ideology recognizes that conflict between labour and capital is endemic to our system of economic organization, but seeks to maintain "orderliness" in the work place and in society at large by channeling that conflict through the institution of collective bargaining. The process enables management to respond flexibly to the dynamic technological and market environment without the risk of overly damaging reactions from its work force, and enables society to go on its appointed way without the risk of fundamental upheavals.[24] In short, collective bargaining is seen as the *sine qua non* of "orderliness" in the industrial relations system and society at large.

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[22] *See* A. FLANDERS, MANAGEMENT AND UNIONS 41-42, 220-38 (1970).

[23] *Compare* H. CLEGG, A NEW APPROACH TO INDUSTRIAL DEMOCRACY 19-38, 82-129 (1960) *with* P. BLUMBERG, INDUSTRIAL DEMOCRACY, THE SOCIOLOGY OF PARTICIPATION ch. 3 (1973).

[24] The classic exposition is that of Dubin, *Constructive Aspects of Conflict*, in COLLECTIVE BARGAINING 42-58 (A. Flanders ed. 1969).

The price which society and the parties themselves must pay for the foregoing benefits is the potential economic wastage of industrial sanctions. The freedom to resort to the strike/lockout is truly the powerhouse of collective bargaining. Bilateral job regulation cannot exist unless the parties can, by force, compel each other to reach agreement. Hence the paradox that conflict is necessary to resolve conflict, that "disorderliness" is necessary to promote "orderliness". However, because the price is believed to be a very onerous one for society and the parties to pay, the system requires that the freedom to inflict economic harm be exercised "responsibly". In this context, "responsibility" means that every effort should be made to minimize the frequency of strikes and lockouts.[25] Thus, some jurisdictions require compulsory strike votes and compulsory conciliation and cooling-off periods as prerequisite to lawful conflict. Others either negate or seriously limit the freedom to resort to conflict in essential industries and in the public sector. In particular, every jurisdiction save Saskatchewan imposes some form of peace obligation.

The peace obligation can be regarded as a function of societal insistence upon "responsible" collective bargaining. In this context, "responsibility" has several aspects. Foremost is the desire to limit the potential for economic conflict to intermittent and predictable time periods, namely after the collective agreement has expired. Disputes of interest, which are those aimed at securing new or amended terms and conditions of employment, are legitimate only during the prescribed timeliness period. Disputes of right are those concerning the administration of the current collective agreement and must be resolved peacefully — normally through arbitration.[26] Hence there is the categorization of the Canadian system of collective bargaining as "static" rather than "dynamic".

The philosophy of the "absolute" peace obligation represents a paramount commitment to the goal of industrial peace. Guaranteed periods of peace are seen as "good" for society because the public can predict conflict periods and prepare strike insurance and because society is spared constant economic wastage. They are seen as "good" for management and labour for similar reasons and also because the parties, knowing their fixed obligations for a pre-determined period, can plan their affairs with certainty.

The philosophy of the "qualified" peace obligation, on the other hand, acknowledges that collective bargaining can have a legitimate role throughout the period of the agreement if the parties so elect. It recognizes that industrial relations operate in a dynamic economic and

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[25] For a different view of "responsibility" in this context, *see* V. ALLEN, MILITANT TRADE UNIONISM ch. 2 (1966).

[26] In practice there is no rigid distinction between conflicts of "right" and "interest". *See* Wedderburn, *Conflicts of Right and Conflicts of Interest in Labour Disputes*, in DISPUTE SETTLEMENT PROCEDURES IN FIVE WESTERN EUROPEAN COUNTRIES (B. Aaron ed. 1967).

technological environment and that the parties may wish to alter their agreement, by economic pressure if necessary. Implicit in the philosophy of the "qualified" peace obligation is a commitment to the joint regulation/collective freedom of contract function of collective bargaining over the function of industrial peace. The commitment is limited in the sense that the parties must "contract in" to the right to impose in-term pressure;[27] otherwise, the peace obligation is deemed to be "absolute". The crucial point in all instances is that the system visualizes the strike as the ultimate determinant of interest disputes between the parties, and statutory definitions of "strike" should be construed in that light. Mid-term work stoppages that are not concerned with obtaining employment concessions — such as honouring picket lines and hot cargo declarations, refusing to obey management orders promulgated in breach of provisions of the agreement, slowdowns to preserve employment opportunities, concerted fishing trips and protest stoppages against government legislation — belong to the domain of collective agreement arbitration, not to the "strike" ban as the term is properly understood in the system.

Secondly, the peace obligation is commonly justified by analogy with the principle *pacta sunt servanda*, namely that the parties are morally obliged to keep their bargain and should not seek to impose unilateral amendments through economic pressure.

Thirdly, the peace obligation is commonly rationalized by analogy with the contract law doctrine of consideration. The employer's *quid pro quo* for making employment concessions is the union's relinquishing its right to strike for the duration of the agreement. Similarly, society's *quid pro quo* for granting statutory rights of collective bargaining to labour is the latter's relinquishing its right to strike during the agreement.

Fourthly, the peace obligation is often rationalized by reference to the "force of tradition". It has been accepted by the parties for so long that it has become one of those "common ideologies" or "shared understandings" which give the industrial relations system its coherence, unity and stability. That being so, it is too firmly entrenched to change.

In addition, the system imposes legal reinforcements to the compulsory peace obligation, again in the interests of "responsible" collective bargaining. The union is not only under a duty to avoid actually initiating or authorizing illegal strikes, but will also be vicariously liable for unauthorized action unless it takes prompt and affirmative action against the participants to bring the strike to an end.[28] In effect the union becomes the "policeman of industry", a co-partner with management. Trade union "responsibility" is defined in terms of its contractual obligations to management, not in terms of its members' wishes. Further, the system requires that there be only one collective

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[27] *See* pp. 597-98 *infra*.

[28] The jurisprudence is described in D. BROWN & D. BEATTY, CANADIAN LABOUR ARBITRATION, paras. 9.2430-9.2500 (1977).

agreement for a unit of employees, which constitutes the exclusive source of job regulation for that unit. The legal potentiality for shop floor bargaining such as prevails, for instance, in certain industries in Britain, is non-existent. This, combined with the general trend towards larger bargaining units which are more likely to be serviced by the professional and therefore "responsible" full time union officer, again provides a disincentive to autonomous and "irresponsible" work group bargaining.

Not only does the system prohibit the use of sanctions over disputes of interest during the collective agreement, it also extends the peace obligation to disputes of right. Compulsory grievance arbitration[29] is substituted as the "just and equitable" method of resolving disputes over the meaning and application of the agreement. The debatable assumption is, of course, that grievance arbitration is in fact a "just and equitable" alternative. Be that as it may, there is an implicit legislative mandate that arbitration should promote, not hinder, dispute resolution and that nothing should obstruct arbitration in its pursuit of that designated goal.

The last significant feature of the system which pertains to an evaluation of the compulsory peace obligation is the assumption that, once in a lawful strike/lockout position, the parties should have relatively equal bargaining strengths to compel each other to reach agreement. The point of balance must obviously be a rough one. There neither is nor can be an objective, mathematical formula. The location of the point is ultimately a value judgement depending on ideological preferences. Therefore, it is not surprising that legal responses to issues such as whether individual strikers can bump into their old jobs at the expense of replacements, whether the employer can hire any replacements during the strike, and the ambit of permissible picketing, vary considerably between the provinces. However, the bottom line is surely that relative economic strengths are meaningful; otherwise, unilateral regulation may replace joint regulation. The balance of power is highly relevant when the striking union stands to lose bargaining weapons, such as the picket line, because other employees to whom the weapon is directed fall afoul of the statutory peace obligation. In these situations, it is essential to evaluate the peace obligation in the context of the economic struggle enshrined by the system, which necessarily raises fundamental value judgements.

Two questions are raised by the foregoing restatement of the basic philosophies of the system as they affect the ambit of the peace obligation. The first is whether the current legal definitions of the peace obligation satisfactorily entrench those philosophies. The second matter is whether the philosophies themselves are open to challenge, and if so,

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[29] Arbitration is compulsory in Ontario, Quebec and Prince Edward Island. Elsewhere, although arbitration is "consensual", the clear mandate is that it is the preferable method of resolving "rights" disputes. *E.g.*, Volvo Canada Ltd. v. U.A.W., Local 720, [1980] 1 S.C.R. 178, at 202-04, 79 C.L.L.C. 15,238, at 15,255 (1979) (Laskin C.J.); General Motors of Canada Ltd. v. Brunet, [1977] 2 S.C.R. 537, 77 C.L.L.C. 14,591 (1976).

what the proper parameters of the peace obligation ought to be. The next section considers the first of these questions.

B. *The Legal Parameters of the Peace Obligation*

The peace obligation arises in two contexts: labour relations legislation and the collective agreement. With respect to the former, the peace obligation is generally imposed by outlawing "strike" action during the currency of the collective agreement. The meaning of "strike" is therefore crucial. In regard to the latter, it is established that the parties to a collective agreement can extend the ambit of their private peace obligation beyond the parameters laid down in the statute, although they cannot reduce those parameters.[30] Articles which purport to contract out of the statutory "no-strike" prohibition are void because repugnant to the legislation, although they may remain valid for the purposes of restricting the employer's power to impose discipline on the work force and its power to recover damages in arbitration against the union.[31] In addition, notwithstanding that particular employee job action constitutes neither a prohibited statutory "strike" nor a prohibited "strike" under the collective agreement, employees who violate their individual obligations to work may face discipline[32] — subject to any "just cause" provision in the agreement — which may also impose liabilities on the union in its own name.[33]

If the job action constitutes a "strike" under the legislation, the following remedies are available to the employer. First, the employer may apply for a cease and desist order from the labour relations boards in those provinces where the boards have jurisdiction to grant that remedy.[34] Secondly, the employer may apply to the courts for an

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[30] *See, e.g.*, Canex Placer Ltd. v. Industrial Workers, Local 17, 76 C.L.L.C. 16,244, at 16,251 (B.C.L.R.B. 1976).

[31] *See* pp. 573-74 *infra*.

[32] *See, e.g., Canex Placer, supra* note 30, at 16,251-52.

[33] *See* Winnipeg Teachers' Ass'n No. 1 v. Winnipeg School Div. No. 1, [1976]2 S.C.R. 695, 59 D.L.R. (3d) 228 (1975), where the majority held the union vicariously liable for damages for counselling individual teachers to breach their personal obligations to perform lunch time duties. Laskin C.J., in a dissenting judgment, did not appear to consider the possibility that the union was vicariously liable. Rather, he held that the union was not liable because it had neither breached a *specific* term of the agreement whereby it guaranteed individual employee compliance with their personal obligations, nor had it committed the tort of inducing breach of contract. *Id.* at 698-711, 59 D.L.R. (3d) at 229-40. Significantly, Laskin C.J. contemplated the possibility of tort liability on the union's part, although, on the facts of the case, he was not prepared to hold that any economic tort had been committed. In the Manitoba Court of Appeal, Hart J.A. appeared to base the union's liability on vicarious responsibility, but he also hinted that the union may have been liable for procuring breach of the statutory "no-strike" ban: [1973]4 W.W.R. 623, at 631-32 (Man. C.A.).

[34] *E.g.*, in British Columbia, Alberta, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Newfoundland and the federal jurisdiction, the respective Labour Relations Boards have the power to grant such an order.

injunction and/or damages for breach of the labour relations statute.[35] This would be the normal procedure in provinces which do not confer equivalent remedial powers on the labour relations boards. In provinces where the labour boards do have cease and desist powers, it is theoretically possible for the employer to proceed in court on the basis of breach of the labour relations statute, although the court would normally remit the case to the labour board.[36] Only in British Columbia[37] and, *arguendo*, Ontario[38] is court action precluded. Thirdly, to the extent that the statutory "no strike" bar forms part of the collective agreement, the employer could proceed in arbitration for damages[39] and, although less likely in view of the delay factor, for injunctive relief.[40] Lastly, the union and individual participants may face prosecution for breach of the statute, but in practice, consent to prosecute is granted infrequently.[41]

If the job action constitutes a "strike" under an expanded private peace obligation, then this would constitute a dispute over the interpretation of a collective agreement which should properly be resolved by arbitration, not by the boards or the courts.[42] In those provinces which require that "rights" disputes be resolved by "arbitration" exclusively, the latter jurisdiction would appear to be ousted.[43] Where the legislation requires that they be resolved by arbitration "or otherwise", it makes for sound policy that the dispute be remitted to arbitration: to do otherwise would usurp the arbitration process.[44] In

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[35] Electrical Workers, Local 2085 v. Winnipeg Builders' Exch., [1967] S.C.R. 628, 65 D.L.R. (2d) 242.

[36] *See, e.g.*, McKinlay Transp. Ltd. v. Goodman, [1979] 1 F.C. 760, 78 C.L.L.C. 15,028, 90 D.L.R. (3d) 689 (Trial D. 1978); Broadcast Employees v. Attorney General of Canada, [1980] 1 F.C. 720, 79 C.L.L.C. 15,370 (App. D. 1979). S. 133(5) of The Alberta Labour Act, 1973, S.A. 1973, c. 33, reaffirms that the courts retain concurrent original jurisdiction. That jurisdiction was exercised in City of Calgary v. Transit Union, Local 583 (unreported, Alta. S.C., 27 Mar. 1978) (J.D.C. 135723).

[37] Labour Code, R.S.B.C. 1979, c. 212, ss. 31-35. Note the proviso in s. 32(2) with respect to wrongful acts or omissions which cause "immediate danger of serious injury to an individual or . . . actual obstruction or physical damage to property". S. 32(4) says that the courts can award damages for action which the board has already decided is illegal, but only with the consent of the board.

[38] This is the possible effect of The Rights of Labour Act, R.S.O. 1970, c. 416, s. 3.

[39] *Re* Oil, Chemical & Atomic Workers and Polymer Corp., 10 L.A.C. 51 (Laskin, 1959), *aff'd, sub nom.* Imbleau v. Laskin, [1962] S.C.R. 338, 33 D.L.R. (2d) 124 (1961). *See also Re* Photo Engravers' Union No. 35 and Toronto Star Ltd., [1972] 1 O.R. 369, 23 D.L.R. (3d) 153 (H.C. 1971).

[40] Arbitrators have assumed this inherent jurisdiction. *See, e.g., Re* Clothing Workers and Polax Tailoring Ltd., 24 L.A.C. 201 (Arthurs, 1972).

[41] The Ontario practice is described in Paperworkers Union v. Cameron Packaging Inc., [1979] 2 Ont. L.R.B.R. 614.

[42] *See, e.g., Canex Placer, supra* note 30.

[43] *See* Quebec Labour Code, L.R.Q. 1977, c. C-27, s. 100; Prince Edward Island Labour Act, R.S.P.E.I. 1974, c. L-1, s. 36(1); The Labour Relations Act, R.S.O. 1970, c. 232, s. 37(1).

[44] The courts have traditionally not intervened when a question of interpretation of the agreement is involved. *See* Hansen & England, *Recent Developments in Labour Law in Nova Scotia*, 4 DAL. L.J. 391, at 424-35, 459-66, and the authorities cited at n. 90.

Winnipeg Teachers' Association No. 1 v. *Winnipeg School Division No. 1*,[45] the majority of the Supreme Court of Canada held that it had jurisdiction to determine whether a work to rule campaign violated the collective agreement because both parties agreed that it should hear that issue. The majority relied on a *dictum* of Laskin C.J. in *McGavin Toastmaster Ltd.* v. *Ainscough*[46] to that effect. However, it is doubtful whether Laskin C.J. intended to formulate such a rule in that case, and he forcefully repudiated it in his dissent in *Winnipeg Teachers*.[47] In the later case of *General Motors of Canada Ltd.* v. *Brunet*,[48] Mr. Justice Pigeon, speaking for the majority of the Supreme Court of Canada, held that the courts could only enforce provisions of the collective agreement in two instances: first, where the arbitrator has made an award and the court is asked either to enforce it or to calculate benefits owed to an employee pursuant to a correct formula as determined by an award; or, secondly, where the arbitrator has not made an award but the parties are in agreement as to the true meaning of the article in question. This would appear to restrict the court's original jurisdiction to grant injunctions in respect of private "no-strike" bans, except where the union admits to violating the article. On the other hand, the Supreme Court of Canada in *Local 273, Longshoremen's Association* v. *Maritime Employers' Association*,[49] the most recent case of that Court on point, upheld an injunction restraining breach of a private "no-strike" clause without discussing whether it had jurisdiction to interpret collective agreement provisions. The decision may be rationalized on the ground that the clause was worded substantially the same as the statutory definition in section 107(1) of the Canada Labour Code[50] and that the agreement itself expressly precluded recourse to extrinsic evidence to supplement the plain meaning of the language. However, the intention of the parties was for an arbitral determination of the issue, and this would appear to necessitate an analysis of *General Motors*.[51] It is unfortunate that the Court did not avail itself of the opportunity to clarify this vexed jurisdictional question. It may be possible to argue that since the statutory definitions of "strike" are generally prefaced by the words "strike *includes*",[52] the legislation may encompass private peace

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[45] *Supra* note 33.

[46] [1976] 1 S.C.R. 718, 54 D.L.R. (3d) 1 (1975).

[47] *Supra* note 33, at 706-07, 59 D.L.R. (3d) at 236-37.

[48] *Supra* note 29.

[49] [1979] 1 S.C.R. 120, 78 C.L.L.C. 15,057 (1978).

[50] R.S.C. 1970, c. L-1, *as amended by* S.C. 1972, c. 18, s. 1.

[51] *Supra* note 29.

[52] Only the Quebec Labour Code, L.R.Q. 1977, c. C-27, s. 1(*g*), does not use the word "include" in the definition of strike. The following authorities support an expansive interpretation of "includes": Robb Eng'r v. U.S.W., Local 4122, 25 N.S.R. (2d) 298, at 303, 86 D.L.R. (3d) 307, at 312-13 (C.A. 1978); Regina v. Electrical Workers, Local 1818, 4 N.S.R. (2d) 556, 73 C.L.L.C. 14,163 (C.A. 1972); *Re* Inco Ltd. and U.S.W., Local 6166, [1978] 1 W.W.R. 48, at 56, 81 D.L.R. (3d) 469, at 479 (Man. Q.B. 1977), *aff'd* 78 C.L.L.C. 15,008, 86 D.L.R. (3d) 407 (Man. C.A. 1978);

obligations which are broader in scope than the statutory instances of "strike". In that case, the courts would retain original jurisdiction for breach of the statute. However, that was not raised in the *Longshoremen's* case.

If the job action is neither a statutory "strike" nor in breach of the private "no-strike" clause, the employees may commit breaches of their personal obligations to work under the agreement, for which they may be disciplined, subject to any "just cause" provision.[53] Moreover, the union may be vicariously liable in arbitration for such breaches by analogy with the *Polymer* doctrine.[54] It may also incur tortious liability[55] for inducing breach of contract, intentional injury to the employer by use of unlawful means, and conspiracy to injure the employer by use of unlawful means — the combination consisting of the union in its own name and employee participants in the job action.

Industrial action takes many forms, such as work to rule, overtime ban, sick-out, mass resignation and refusal to deal with "hot" employers and "hot" products. These are normally typified as "organized conflict" inasmuch as they form part of a conscious strategy to change the causes of worker discontent. In this paper, attention is focused on "organized" sanctions. It is important to remember that conflict may also be "unorganized", given that workers may respond as individuals to the causes of their discontent.[56] The latter can take many forms: for example, high absenteeism, high labour turnover, indiscipline, low morale, reduced productivity and sabotage. These factors may be more damaging to the business than "organized" sanctions. There is evidence to suggest that outlawing "organized" manifestations of conflict, without eradicating the causes of the conflict, may result in an increase in "unorganized" conflict.[57] Worker discontent is merely channeled into alternative forms. This is clearly a significant factor in evaluating the efficacy of the compulsory peace obligation.

C. *Statutory Definitions of "Strike"*

These vary among the provinces. The Saskatchewan Trade Union Act[58] is unique in not providing a definition, so that the question falls to be decided at common law. The common law authorities are divided as to whether "strike" requires a subjective component, whereby employees must have, as their purpose, the winning of employment concessions, or whether it is purely objective in the sense of requiring only a concerted

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British Columbia Hydro & Power Auth. v. I.B.E.W. Locals 258 & 213, 77 C.L.L.C. 16,430, at 16,433 (B.C.C.A. 1976).

[53] *Canex Placer*, *supra* note 30, at 16,251-52.

[54] *Supra* note 39.

[55] *Supra* note 40.

[56] The distinction is discussed in R. HYMAN, STRIKES 53 (2d ed. 1977).

[57] *Id.* at 53-56.

[58] R.S.S. 1978, c. T-17.

interruption of production.[59] Elsewhere,[60] the statutory definitions have two common components: first, concerted activity among employees and, secondly, some disruption of the employer's operations.

As regards the first component, this is normally expressed as requiring at least two "employees"[61] who act "in combination or in concert or in accordance with a common understanding". The requirement is relatively easy to satisfy. Resolutions at union meetings and work place congregations in favour of job action are conclusive evidence of concert.[62] Moreover, it appears to be established after the Supreme Court of Canada decision in the *Longshoremen's* case that participation in job action out of personal belief in the philosophy of trade union "solidarity" is irrefutable evidence of concert.[63] Although that case

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[59] A subjective component was imposed by Lord Denning M.R. in Tramp Shipping Corp. v. Greenwich Marine Inc., [1975] 1 W.L.R. 1042, at 1046, [1975] 2 All E.R. 989, at 991-92 (C.A.). A purely objective test is suggested in 32 HALSBURY, LAWS (2d) para. 744. The common law test did not develop with this problem in mind. A review of the cases is given in *Re* Dominion Bridge Co. and U.S.W., Local 5917, 15 L.A.C. (2d) 295 (Vancise, 1977). In Saskatchewan Power Corp. v. Electrical Workers, Local 2067, 78 C.L.L.C. 15,044 (Sask. C.A. 1977), the court held that a "study session" aimed at winning bargaining concessions was a "strike" for the purposes of an unfair labour practice under s. 11(1)(*a*) of the Saskatchewan Trade Union Act, R.S.S. 1978, c. T-17.

[60] Canada Labour Code, R.S.C. 1970, c. L-1, s. 197(1)(*a*), *as amended by* S.C. 1972, c. 18, s. 1; New Brunswick: Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 1(1); Nova Scotia: Trade Union Act, S.N.S. 1972, c. 19, s. 1(1)(*v*); Ontario: The Labour Relations Act, R.S.O. 1970, c. 232, s. 1(*m*); Prince Edward Island: Labour Act, R.S.P.E.I. 1974, c. L-1, s. 7(1)(*l*); British Columbia: Labour Code, R.S.B.C. 1979, c. 212, s. 1(1); Alberta: The Alberta Labour Act, 1973, S.A. 1973, c. 33, s. 49(1)(*l*); Manitoba: The Labour Relations Act, S.M. 1972, c. 75, s. 1(*v*).

[61] Thus, in Holtzheuser Bros. and Retail Union, Local 580, [1979] 1 Can. L.R.B.R. 421 (B.C.L.R.B.), it was held that a bargaining unit of one employee could not engage in a "strike" so as to legalize picketing of that employee's work place under the Code.

[62] *See, e.g.*, Wheelabrater Corp. of Canada v. Holburn, [1974] Ont. L.R.B.R. 490, where employees held a meeting in a nearby café where the collective resolve to honour a picket line was formulated. More dramatically, in Swansea Constr. Co. v. Royal Trust Co., [1956] O.R. 911, 5 D.L.R. (2d) 687 (C.A.), a single employee on a one-man site was held to be acting in concert when he was instructed by his union representative to honour the picket line of another union.

[63] *Supra* note 49, at 137-38, 78 C.L.L.C. 15,057 at 15,065. *Cf.* Nelson Crushed Stone v. Cement Workers, Local 494, 78 C.L.L.C. 16,832, at 16,841 (Ont. L.R.B. 1977) where the board stated:

> The proposition that the principles or philosophy of a particular group of individuals can, if implemented on an individual basis, make actionable an otherwise lawful activity, without any evidence of an agreement, either tacit or express between the individuals in question, is not a sound theory upon which to base a statutory violation, especially one which entails the risk of criminal prosecutions.

However, the board added that where a person's beliefs in "union solidarity" are raised, this will not refute a finding of concert without additional evidence of individual decision-making. The rationale underlying this is that the employees having come together for bargaining, and taking notice of the general practice among unions to honour picket lines, there is a "potential for concerted action" which the board will not ignore. *Id.* at 16,839.

concerned honouring picket lines, the thrust of the Court's decision was that personal beliefs having their "common root in labour organization" would constitute a "common understanding", so that the decision would probably apply to all forms of job action in which union "solidarity" is raised as a defence. Less clear is the situation where workers refuse to perform the job because they believe that they have such a right under the collective agreement or the general law. This might arise, for instance, where a clause in the agreement gives the right to honour picket lines, to observe "hot cargo" declarations, to refuse to work alongside non-union or non-affiliated workers, or to refuse overtime assignments. It might also arise where workers disobey orders involving the performance of unsafe work or work scheduled in violation of collective agreement articles which limit management's powers to issue such orders. In these situations, there is authority suggesting that the existence of such rights, when exercised, is evidence of individual rather than concerted decision-making.[64] However, the inference is rebuttable by other evidence pointing to concert. Thus if two employees refuse to cross a picket line, because of a clause in their agreement granting them that right, they are not on "strike"; whereas if they discuss the matter between themselves and collectively conclude that they are entitled to honour the line, they are on "strike". Indeed, even in the absence of such discussion, it is arguable that the *shared* reason for not crossing, albeit individually held, is "in accordance with a common understanding". The practice of courts, boards and arbitrators in deciding whether job action is concerted is to require employees to come forward with credible and convincing evidence of individual decision-making to rebut an inference of concert arising from the simple fact that job action has occurred.[65] As the Ontario Labour Relations Board recently stated, it will not "assume the posture of an ostrich and blind itself to the labour relations realities".[66] The fact that employees will have come together for the very purpose of collective bargaining, against the background of a dispute with management, raises the inference that job action is concerted.

It is submitted that because the concert requirement is so easily satisfied, it is not, standing alone, adequate guarantee that job action which should not constitute a "strike" is outside the statutory definition. If two employees resolve together to quit in order to take up another offer of more attractive employment, they should clearly not be on "strike"! The determination must be made having regard to the *purpose* of the employees and the legitimacy of that purpose in the light of the underlying philosophies of the industrial relations system.

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[64] *Nelson Crushed Stone*, *supra* note 63, at 16,845. *See also* Hickeson-Langs Supply Co. v. Warehousemen Drivers Local 419, [1974] Ont. L.R.B.R. 280, Canadian Elevator Mfrs. and Union of Elevator Constructors Local 90, [1976] 1 Can. L.R.B.R. 114, at 124-25, 75 C.L.L.C. 1301, at 1308 (Ont. L.R.B. 1975), *Re* McCormick's Ltd. and Milk & Bread Drivers, Local 647, 7 L.A.C. (2d) 334 (O'Shea, 1974).

[65] *Nelson Crushed Stone*, *supra* note 63, at 16,840.

[66] *Id.* at 16,841.

As regards the second component, that the job action cause some disruption of the employer's operations, the statutory formulae vary. All statutes, except the Quebec Labour Code, include the requirement that there be a "cessation of work", a "refusal to work" or "a refusal to continue to work". The Quebec Labour Code merely speaks of a "concerted cessation of work",[67] but other job action would be encompassed by the section 96 prohibition against "a slackening of work designed to limit production".

The vital question is what is meant by "work"? It could have three possible interpretations. First, it could be read literally so as to encompass *any* interruption in operations, on the theory that the statutory peace obligation guarantees the employer absolute freedom from all forms of concerted economic disruptions during the agreement. Secondly, it could be read as referring to those duties which the employee is obliged to perform under the collective agreement, on the theory that supremacy is to be afforded to collective freedom of contract. Thirdly, it could be construed in the mischief sense so as to encompass disruptions which the underlying philosophies of the system deem to be illegitimate. It is submitted that the third meaning is the preferable one because it alone permits consideration of all the relevant policy interests involved. The literal meaning is clearly a blunt instrument — two employees who decide together to refuse to perform unsafe work are surely not on "strike" as that word is generally understood. The contractual obligations meaning ignores other legitimate policies at the expense of freedom of contract. A clause in the collective agreement whereby the employer promises not to schedule work in the event that the union gives notice of strike action should not prevent there being a "strike" where the union's purpose is to force employment concessions from the employer. This is clearly repugnant to the statutory scheme of restricting interest disputes to the lawful conflict period.

With the exceptions of Nova Scotia and Alberta, other jurisdictions have expanded the basic formula to ensure that lesser forms of job action are covered. The federal jurisdiction, New Brunswick, Ontario and Prince Edward Island therefore include in the definition of "strike" "slowdown" or other "concerted activity" which is "designed" to disrupt operations. The word "designed" imposes an objective legal standard so that "if employee conduct produces the proscribed results and might reasonably be expected to do so, it is 'designed' so to do . . . irrespective of the employee's motive or purpose."[68] Whereas the Canada Labour Code requires the "slowdown" or "concerted action" to be in relation to the participant's "work", the other jurisdictions merely require it to have the *effect* of disrupting operations. The latter provinces refer to "slowdown or other concerted activity on the part of employees

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[67] L.R.Q. 1977, c. C-27, s. 1(*g*).

[68] *Re* Halton Bd. of Educ. and O.S.S.T.F., Dist. 9, 17 L.A.C. (2d) 279, at 285 (Swan, 1978).

designed to restrict or limit output".[69] Thus the meaning of "work" remains crucial under the Federal Code. Four provinces provide further reinforcement to their definitions. In British Columbia, there need only be an "act or omission that is intended to, or does restrict or limit production or services".[70] In Manitoba, there need only be "a refusal to continue the standard cycle or normal pattern of operation".[71] In Newfoundland, "an organized slowdown intended to restrict or limit production"[72] suffices, which is similar in effect to section 96 of the Quebec Labour Code.[73]

As with the word "work", words such as "production", "services" and "output" are susceptible to three possible meanings: the literal meaning of *any* disruption, for example, of "production"; "production" which would flow from contractually-binding duties; or the mischief meaning of "production" which would flow but for concerted disruptions which are illegitimate in terms of the philosophies of the system. The fact that the additional wording is included suggests that it is intended to have a different meaning than "work". The strong implication is that the literal meaning applies, although for reasons given earlier it is submitted that a mischief interpretation would be preferable.[74] Lastly, it is established that the legal standard for determining whether there is a disruption of operations within all of the above-mentioned formulae is an objective one.[75] It suffices that the proscribed results do in fact flow from the union's conduct, irrespective of the union's motive for engaging in the conduct.

In Newfoundland, Ontario, Quebec, Prince Edward Island and the federal jurisdiction, the requirements of concert and disruption of operations are all that are necessary for there to be a "strike". In Alberta, British Columbia, Nova Scotia and Manitoba, there is the further requirement that employees act "for the purpose of compelling their employer . . . to agree to terms or conditions of employment or to aid other employees to compel their employer . . . to accept terms or conditions of employment".[76] This introduces a subjective component of illegitimate motive into the definitions. In the context of the compulsory peace obligation, it entrenches the basic philosophy that disputes of interest are not to be resolved by job action during the currency of the

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[69] New Brunswick Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 1(1). Ontario: The Labour Relations Act, R.S.O. 1970, c. 232, s. 1(*m*). Prince Edward Island: Labour Act, R.S.P.E.I. 1974, c. L-1, s. 7(1)(*l*).

[70] Labour Code, R.S.B.C. 1979, c. 33, s. 1(1).

[71] The Labour Relations Act, S.M. 1972, c. 75, s. 1(*v*).

[72] The Labour Relations Act, S.N. 1977, c. 64, s. 29

[73] L.R.Q. 1977, c. C-27.

[74] *See* p. 534 *infra*.

[75] *See, e.g.*, MacMillan, Bloedel Packaging Ltd. and Woodworkers, Locals 5 & 8, [1976] 1 Can. L.R.B.R. 100, at 103 (B.C.L.R.B. 1975).

[76] The Alberta Labour Act, 1973, S.A. 1973, c. 33, s. 49(1)(*l*); Labour Code, R.S.B.C. 1979, c. 212, s. 1(1); Trade Union Act, S.N.S. 1972, c. 19, s. 1(1)(*v*), Labour Relations Act, S.M. 1972, c. 75, s. 1(*v*).

collective agreement, but that job action for *other* purposes is permissible within the statutory scheme. It must be remembered that job action which is outside the statutory prohibition may nevertheless be illegal under the collective agreement as violating either an expanded voluntary peace obligation or the individual obligation of employees to work. The scope of collective agreement liability is for the parties to delineate in collective bargaining. The statutory scheme therefore establishes an irreducible minimum of mid-term protection for the employer — the ban on conflicts of interest — and leaves the rest to private negotiation, in furtherance of collective freedom of contract.

In contrast, there are numerous *dicta* in jurisdictions which lack an express subjective component in their definitions that motive is irrelevant. The Supreme Court of Canada recently affirmed those *dicta* in the *Longshoremen's* case, in which the Court unanimously rejected the union's contention that its motive, the pursuit of "union solidarity", meant that honouring picket lines did not constitute a "strike" under section 107(1) of the Canada Labour Code. Having reviewed the legislative history leading to the replacement of the Industrial Disputes Investigation Act of 1927,[77] which included a subjective element, by the Industrial Relations and Disputes Investigation Act of 1948,[78] which adopted the current definition, Estey J. concluded:

> There is no room for doubt now that Parliament has adopted an objective definition of "strike", the elements of which are a cessation of work in combination or with a common understanding. Whether the motive be ulterior or expressed is of no import, the only requirement being the cessation pursuant to a common understanding.[79]

This view, it is submitted, reflects a simplistic, crude and incorrect appreciation of the role of the peace obligation in the system. Whereas it clearly catches the mischief which the system deems illegitimate, namely job action in pursuit of interest disputes during the collective agreement, it goes far beyond that in establishing the peace obligation as a total guarantee to the employer of uninterrupted operations. That is not the purpose of the peace obligation. Rather, the system acknowledges that mid-term job action for certain non-collective bargaining purposes may be permissible in certain circumstances and that freedom of contract is of intrinsic worth, for instance, in determining the effect of collective agreement articles establishing rights to refuse certain orders. It also recognizes that unions should have relatively equal bargaining power without, for instance, seeing their freedom to lawfully picket rendered

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[77] R.S.C. 1927, c. 112, s. 2(*k*).

[78] S.C. 1948, c. 54, s. 2(*p*).

[79] *Supra* note 49, at 138-39, 78 C.L.L.C. at 15,065. To the same effect, *see Nelson Crushed Stone*, *supra* note 63, at 16,843; *Re* Kendall Co. and U.S.W., 17 L.A.C. (2d) 408 (Adams, 1978); Domglas Ltd. v. Glass & Ceramic Workers, 76 C.L.L.C. 16,339, at 16,343 (Ont. L.R.B. 1976), *aff'd* 78 C.L.L.C. 14,931 (Ont. H.C. 1978). But note in *Domglas*, *id.* at 14,939-40, the reservations expressed by Goodman J. in the case of "pure" political strikes.

illusory by rulings of illegal "strike" against employees who observe their lines. The subjective model provides sufficient flexibility to accommodate most, if not all, of these competing policies and to that extent, it is submitted, is to be preferred.

The extent to which both models satisfactorily adjust the competing policies is considered next in relation to the following common types of "organized" job action: overtime bans, work to rule, refusal to cross picket lines, stoppages pursuant to non-affiliation and hot cargo clauses, mass resignation and sick-out. Before considering these in detail, two general points must be emphasized which potentially affect the legal response to these forms of job action.

First, all provinces save Quebec preface the statutory definition with the word "includes". This has been interpreted as making the specific instances of "strike" non-exhaustive,[80] although it is uncertain what other conduct is encompassed. The question is particularly important in jurisdictions with the subjective component, since a wide interpretation of "includes" can potentially nullify that component. In Manitoba and Nova Scotia, there is evidence of a move in this direction. The Manitoba and Nova Scotia Courts of Appeal recently held by an expansive construction of "includes" that the October 14th National Day of Protest stoppages constituted "strikes". The Nova Scotia decision[81] was based on the court's perception of the statutory scheme to outlaw *all* concerted work stoppages during the collective agreement, irrespective of whether or not the stoppage is aimed at winning concessions from the employer. The Manitoba decision[82] was based on the following words from the employer's factum, which the Court of Appeal approved:

> It is cold comfort to a person placed in the line of fire between the Union, and the government, and unable to duck, to be told that, when the projectile passes through his body on the way to its target, the firer of the projectile has nothing personal against him and certainly has no desire to injure him.[83]

The thrust of these cases comes very close to judicially legislating the objective model into those provinces. In Alberta, neither the Board of Industrial Relations nor the courts have had occasion to consider in depth the meaning of "includes". The board's consistent practice of holding that refusals to cross picket lines constitute "strikes", without addressing the British Columbia decisions based on purpose,[84] plus certain comments in the courts,[85] suggest that little importance is attached to the subjective component in that province. However, there is a veiled hint in a recent board decision involving an overtime ban that there may still be

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[80] *Supra* note 52.

[81] *Robb Eng'r, supra* note 52, at 310-11, 86 D.L.R. (3d) at 315.

[82] *Inco, Ltd., supra* note 52.

[83] *Id.* at 15,110, 86 D.L.R. (3d) at 410 (C.A.).

[84] *E.g.*, Alpha Constr. Ltd. v. Carpenters, Local 1779 (unreported, Alta. Bd. of I.R., 21 Apr. 1978) (nos. 892.810 and 1013A15).

[85] Dover Corp. (Canada) Ltd. v. Maison Holdings Ltd., [1977] 5 W.W.R. 190 (Alta. C.A. 1976).

life in the purpose requirement.[86] In British Columbia, on the other hand, the board has utilized the purpose component with considerable vigour to balance the underlying philosophies of the Labour Code and the word "includes" has been construed correspondingly.[87]

Secondly, the discretionary power of courts and labour boards to refuse injunctions or cease and desist orders in appropriate circumstances may result in a denial of those potent remedies to employers notwithstanding that there is a literal "strike". The Ontario Board has stated that it will not grant a "direction" where the employer's application is, in the board's opinion, "facetious or provocative"[88] having regard to the industrial relations considerations between the parties. In particular, the board will be loathe to grant relief where the job action is in response to employer initiatives in clear violation of the collective agreement.[89] As the board stated in *Canadian Elevator Manufacturers v. Elevator Constructors, Local 50*:

> While the Board has a public obligation to foster and maintain industrial peace, it cannot be said that this obligation can only be fulfilled by the reflex-like exercise of the Board's powers under those sections. Where, as in this case, an employer deliberately embarks upon a course of action that is unsupported by a reasonably arguable interpretation of the collective agreement, thereby primarily, and we might say baldly, resting its claim on the principle that an employee is obliged to "perform first and grieve later", this Board would not be serving the public by buttressing such recklessness with the full force of the laws of this Province. . . . To issue such powerful relief in the peculiar circumstances of this case could well undermine the integrity of the Board's orders and discourage the self-restraint required in a complex industrial society.[90]

The British Columbia Board has indicated that it would not grant a cease and desist order where the employer is not suffering "serious and immediate harm to its enterprise".[91] Similarly, the courts may refuse injunctions under the "clean hands" doctrine in cases of "unfairness or oppression or perhaps wilful breach by the company of the agreement, or possibly illegality on the company's part".[92] In particular, relief has been denied where the employer has expressly or tacitly held out to the

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[86] Carling O'Keefe Ltd. v. Brewery Workers, Local 287 (unreported, Alta. Bd. of I.R., 15 Aug. 1979) (no. L.R. 58-C-1/2, at para. 24).

[87] *B.C. Hydro*, *supra* note 52.

[88] Ontario-Minnesota Pulp & Paper Co. v. Lumber Workers, Local 2693, [1978] Ont. L.R.B.R. 668, at 676. The Federal Board describes how it will exercise its discretion in National Harbours Bd. and C.N.T.U. Officers, [1979] 3 Can. L.R.B.R. 502.

[89] *Ontario-Minnesota*, *supra* note 88.

[90] [1975] Ont. L.R.B.R. 868, at 872.

[91] Otis Elevator Co. and Elevator Constructors, Local 82, [1976] 2 Can. L.R.B.R. 65, at 70 (B.C.L.R.B.). The same board has indicated that it will not grant an order where the employer is guilty of "improper conduct". *See* Freightliner of Canada Ltd. v. Industrial Workers, Local 14, 80 C.L.L.C. 14,147, at 14,153 (B.C.L.R.B. 1980).

[92] Dewar Insulation Inc. v. Sheetmetal Workers, Local 8, 57 D.L.R. (3d) 609, at 613 (Alta. C.A. 1975).

union that it will not initiate work re-organizations and subsequently does so.[93]

Although this discretion provides a useful safeguard against abuse of statutory "strike" definitions that are too wide, nevertheless it is logically untidy to say that conduct which constitutes a "strike", although it clearly should not, ought not be remedied as a "strike". It would be far better to provide that there was no strike in the first place! The parties clearly should not have to run the risk of such uncertainty. Moreover, notwithstanding that the employer may be denied its most immediately desirable remedy, it can proceed with a damages action and so acquire a valuable trade-off item for subsequent negotiations. In addition, the individual participants will be technically in breach of their personal obligations to work and liable to discipline. Although the arbitrator would probably reduce the quantum of penalty (if the agreement does not exclude that option), the discipline would still be on their records. Lastly, the denial of injunctive relief to the employer would not prevent an injured third party from proceeding against the union: for instance, for the tort of intentional economic injury by the use of unlawful means, these "unlawful means" being constituted by the illegal "strike".

The extent to which the statutory definitions adequately reflect the underlying philosophies of the prevailing system is considered next in the context of the most common forms of job action.

1. *Work to Rule*

Work to rule is defined as the collective performance of job assignments in meticulous accordance with directives as to the manner of their performance — these may be contained either in express articles of the collective agreement or in management-promulgated work rules — and which results in a disruption of operations. This section examines work to rule in two contexts: where the campaign is imposed as a pressure sanction for negotiation purposes; and where management issues new directives and employees "work to rule" in the sense of continuing to perform assignments in accordance with the existing work rules. Job action imposed pursuant to "union security" provisions in the collective agreement, such as right to honour picket line clauses, "hot cargo" and non-affiliation clauses, are considered separately, although they may also be categorized as "work to rule".

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[93] *See* Hiram Walker & Sons, Ltd. v. Distillery Workers, Local 202, [1974] 6 W.W.R. 255 (B.C.S.C.); C.P.R. v. United Transportation Union, Local 144, 14 D.L.R. (3d) 497 (B.C.S.C. 1970).

(a) *Work to Rule as a Bargaining Sanction*

For unions, the main attraction of "work to rule" campaigns is that they afford a means of applying pressure on management while guaranteeing their members an ongoing income. In addition, it may be politically advantageous for employees to be seen merely doing what they are supposed to do rather than engaging in an overt and emotional full scale walkout. It is not uncommon for unions to justify "work to rule" campaigns by pointing out that employees are simply observing rules regarding which, were they to be disobeyed, the employees could face disciplinary action. Nor is it uncommon for unions to believe that "working to rule" does not involve collective or individual breaches of the collective agreement for the purpose of establishing liability against the union and/or individual participants under the statute, the agreement or in tort.

In the situation under consideration, it is assumed that the purpose of the "work to rule" campaign is to compel an employer to agree to terms and conditions of employment so that the subjective component of the "strike" definition in provinces with that component is satisfied. The question is whether, by "working to rule", there can be said to be a "refusal to work", a "cessation of work", a "refusal to continue to work", a "slowdown of work", or "concerted activity on the part of employees in relation to their work", so as to satisfy those definitions. This depends on whether "work" means those assignments which an employee is legally bound to perform under the agreement or whether it has a broader statutory meaning which encompasses the performance of tasks beyond those in strict compliance with contractual obligations. It should be noted that this issue arguably does not arise in provinces where the statutory definitions do not require the concerted activity to relate to the performance of "work", but merely that it have the effect of disrupting operations.

The view that "work" should mean assignments which the employee is bound to perform is *prima facie* appealing in that it does not involve legislative rewriting of the terms of the wage-work bargain. The parties have negotiated their package based on certain assumptions related to the work process and those assumptions should be respected by the legislation. However, since the very purpose of the "work to rule" campaign is to disrupt production, it will normally be the case that the work rules have *not* in fact been observed in the past; otherwise there would be no reason for imposing the campaign. The expectations of the parties are founded on their practices, not on the strict rules. Thus, if management were to discipline an employee for not meticulously observing a work rule in the face of a consistent and widespread pattern of disobedience to the rule in question, such discipline would not be for "cause". If the rule were an express term of the agreement, management would either be estopped from relying on it, at least until it had given reasonable notice to the contrary, or the application of the rule might be struck down as being unreasonable, arbitrary, discriminatory or in bad

faith. If the rule took the form of a promulgation pursuant to "management rights", it would not have been applied consistently in the past and management would have to give reasonable notice of its intent to adhere to it in the future.[94] This belies the common union contention which seeks to justify "work to rule" campaigns on the ground that employees face discipline if they do not comply with the rule.[95] It may be argued that it is unfair to penalize employees and their union for managerial "inefficiency": namely that management is at fault in permitting a divergence between rules and practice to develop. Yet the reality surely is that the union is defeating management's expectations by "working to rule" just as much as management would be defeating the union's expectations were it to impose discipline for non-observance of the rules. The above assumes that the practice of non-observance has continued for a significant time during the life of the current agreement, and perhaps also during the life of previous agreements while the same rules were operative. Justifications based on custom and practice would not have the same force where management promulgates new rules which depart from pre-existing ones, and the issue is whether employees who refuse in concert to obey the new rules are engaging in a "strike". This could arise, for instance, where management amends prevailing rules so as to increase production and "stockpile" for an apprehended strike or lockout. This situation is considered later.

There are no reported cases from Alberta, Nova Scotia or the federal jurisdiction in which a "work to rule" campaign has been held not to constitute a "strike" because the workers are merely performing contractually binding assignments. In some instances, an over-zealous campaign may be associated with clear breaches of *other* obligations, so that it is not just a "work to rule" campaign. Thus in *Transport Labour Relations Board* v. *Truck Drivers, Local 31*,[96] the "work to rule" campaign involved not only strict safety checks in accordance with the safety rules, but also the concerted refusal of overtime and a *general* slowdown. Meredith J. granted an injunction to restrain the campaign on the following grounds: first, that the overtime ban itself constituted a "strike", following the *MacMillan, Bloedel (Alberni) Ltd.* v. *Woodworkers, Local 1-85*[97] decision: and secondly, that the *general* slowdown came squarely within the "slowdown of work" component of the statutory definition. The performance of assignments at a slower pace

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[94] *See, e.g.*, K.V.P. Ltd., 16 L.A.C. 73 (Robinson, 1965); *Re* Fire Fighters, Local 626, and Borough of Scarborough, 24 L.A.C. 78 (Shime, 1972).

[95] *See, e.g.*, the union's argument to this effect in British Columbia Ry. and Council of Trade Unions, [1976] 2 Can. L.R.B.R. 240, at 246 (B.C.L.R.B.).

[96] 54 D.L.R. (3d) 457 (B.C.S.C. 1974). The employees were clearly breaching other obligations in the *British Columbia Ry.* case, *id.*, and in City of Victoria and Labour Rel. Ass'n, [1977] 1 Can. L.R.B.R. 383, at 384 (B.C.L.R.B.).

[97] 73 W.W.R. 584, 13 D.L.R. (3d) 741 (B.C.C.A. 1970) discussed at p. 557 *infra*.

than that impliedly required by the collective agreement is surely a breach thereof.[98]

Ancillary breaches of other obligations under the agreement need not take such a dramatic form. If the work rules in question are express terms of the collective agreement, the authorities suggest that there is a two-way duty on the parties to administer those rules reasonably, in good faith and non-arbitrarily.[99] Employees who utilize their strict contract rights as a smoke screen to exert in-term pressure on their employer for collective bargaining purposes could be said to be acting in bad faith, arbitrarily or unreasonably and therefore in breach of the agreement. The same applies if the rules take the form of unilateral promulgations pursuant to management rights. In this situation, it may also be possible, for the purpose of establishing breach by the employees, to find a consensual variation of the rule based on the parties' subsequent conduct. That would not be possible if the rule were an express term of the agreement, since any amendment must be in writing.[100] The practice of the parties would only be relevant to flushing out ambiguities in the contract language or in raising an estoppel against employees who seek to justify their "work to rule" by reference to strict contractual rights. This analysis has the effect of bringing "work to rule" campaigns within the statutory definition of "strike" while at the same time justifying that conclusion on the basis of breaches of the collective agreement. It necessarily infuses the employees' motive into the statutory definition. If "work" does refer to obligations under the agreement, those obligations involve the standards of reasonableness, good faith and arbitrariness in which motive and the legislative policy of outlawing in-term pressure on

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[98] *See, e.g., Dover Corp., supra* note 85; *Re* Algoma Steel and U.S.W., 7 L.A.C. (2d) 375 (Shime, 1974); *Re* Automobile Workers and Duplate Canada Ltd., 19 L.A.C. 300 (Bennett, 1968).

[99] *See* the authorities cited in note 302 *infra*. This appears to differ from the position at common law under the contract of employment. In Secretary of State for Employment v. Society of Locomotive Engineers, [1972] 2 Q.B. 455, [1972] 2 All E.R. 949 (C.A.), the English Court of Appeal suggested that a "work to rule" is *not* in breach of the employment contract where the rule in question is itself a term of the contract. Provided that the employee performs the task to the letter of his contract, he is not in breach by virtue only of withdrawing his "goodwill". However, where the rule is not itself a contractual term, but is a directive as to how the task should be performed made pursuant to the employer's right to issue lawful and reasonable orders, then meticulous observance of that rule can amount to a breach of contract under three possible analyses. First, Lord Denning said that there is an implied term in the contract that the employee shall not carry out orders so as to *wilfully* disrupt business operations. Secondly, Lord Roskill suggested that there is an implied term that the employee shall not carry out orders in an unreasonable manner which has the *effect* of disrupting the business. This differs from Lord Denning's analysis in its emphasis on consequences rather than intent. Thirdly, Lord Buckley said that there is an implied term that the employee shall promote the commercial objectives of the enterprise and not carry out orders in an unreasonable manner which frustrates those objectives.

[100] *E.g.*, The Labour Relations Act, R.S.O. 1970, c. 232, s. 44(5). *See Re* Kodak Canada Ltd. and Chemical Workers, Local 159, 10 L.A.C. (2d) 332 (Betcherman, 1975).

the employer are most relevant. It is difficult to envisage a "work to rule" campaign of the type under consideration that would not involve breaches of obligations under the agreement.

Assuming that "work" has a special statutory meaning beyond obligations under the agreement,[101] it is almost certain that campaigns designed to exert in-term pressure on employers to make concessions would constitute "strikes". The cornerstone of the legislative philosophy is to protect employers from such pressure during the lifetime of the agreement. There are no reported decisions involving "work to rules" which have held this to be the case in relation to the general labour relations legislation. However, by analogy, two recent decisions involving "work to rule" campaigns under the Ontario School Boards and Teachers Collective Negotiations Act, 1975[102] have suggested that the policy of the statutory scheme overrides private contractual obligations. Section 1(*l*) of that Act requires that the concerted activity be designed to "curtail, restrict, limit or interfere with the operation or functioning of a school program or school programs or of a school or schools".

In *Re Halton Board of Education and Secondary School Teachers Federation District 9*,[103] the union imposed an in-term "pink letter embargo" against the employer, whereby its members refused to apply for or accept positions of responsibility arising from the employer's attempted reorganization of certain schools. The purpose of the campaign was to delay the employer's attempt to reorganize the administration of the schools in question. The arbitration board held that the embargo did constitute a "strike" under the collective agreement (which incorporated the statutory definition) notwithstanding that, in the board's opinion, there was no contractual obligation on individual employees to apply for or accept such positions. It sufficed for a finding of "strike" that the embargo had the objective effect of delaying the reorganization, thereby interfering with the "operation or functioning of a . . . school or schools".[104] In reaching this decision, the board analogized with the overtime ban cases. Whereas an individual may be entitled under the contract to refuse overtime or not to apply for certain positions, the added elements of concert and consequential interference with the employer's operations transforms the activity into a "strike" because that is the clear purpose and policy of the statute.

In *Board of Education of Windsor v. Ontario Secondary School Teachers' Federation, District 1*,[105] the union instructed its members not

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[101] In favour of this view in the context of working to rule are *British Columbia Ry.*, *supra* note 95, at 247 and *City of Victoria*, *supra* note 96, at 384. In British Columbia, however, s. 101 of the Labour Code, R.S.B.C. 1979, c. 212, would, on literal construction of the definition of "strike", encompass any interruptions, irrespective of the binding nature of duties.

[102] S.O. 1975, c. 72.

[103] *Supra* note 68.

[104] *Id.* at 288.

[105] 78 C.L.L.C. 17,255 (Ont. L.R.B. 1978).

to teach summer school courses in order to reinforce an upcoming bargaining demand. There was no contractual obligation on teachers to do the work in question. In holding that the embargo was not a "strike", the Ontario Labour Relations Board emphasized that "the question that we are dealing with here does not relate to any obligations or responsibilities which may arise out of the individual employment contract or of the collective agreement".[106] Rather, the case turned on whether the scheme of the Act encompassed summer school programs within "school programs" or "schools". The board held that those words referred to operations of the employer during the regular school year so that there was no "strike". Although the statute did not include the word "work" in these cases, it is submitted that they do support, by analogy, the view that "work" should be given a purposive construction based on the policy and scheme of the labour relations legislation.

In addition, the union may face liability for an illegal "strike" under an expanded peace obligation in the collective agreement. Of course, the type of work to rule in question, as a statutory "strike", would necessarily involve a breach of the collective agreement, as a result of which the union would be liable for damages and participants would face disciplinary sanctions. However, even if "work" in the statute is construed as relating to contractually binding duties and the campaign does not involve any breaches of obligations, the collective agreement may state that any interruption of production will suffice, irrespective of contractual obligations. In *Re U.S.W., Local 6958 and Pedlar People Ltd.*,[107] an Ontario arbitration decision, employees paid under a "payment by results" system wanted the employer to maintain their bonus rate for the forty minute period of a machine breakdown. The employer refused and the employees responded in concert by dropping their output by twenty-five per cent when the machines went back into operation. The employer disciplined the employees concerned for participation in an illegal "strike", defined under the agreement as involving a "slowdown". The employees argued that there was no "slowdown" since the agreement did not expressly define the normal expected output. In holding that there was an illegal "slowdown", Chairman Hanrahan stated:

> Our conclusion is that employees, whether working on an hourly basis or a bonus system who, because of a real or fancied complaint, slow down their work in order to reduce their employer's normal production fail to fulfill the inherent obligation of their employment and leave themselves open to disciplinary action.[108]

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[106] *Id.* at 17,257.

[107] 20 L.A.C. 323 (Hanrahan, 1969). In *Re Duplate*, *supra* note 98, an Ontario award, the work "slowdown" in the agreement was interpreted to mean any "deliberate reduction from the usual level of production in concert to limit output". *Id.* In *Re* Marble Contractors' Ass'n, 13 L.A.C. 175 (Cameron, 1962), a "strike" was held to exist when the union unilaterally declared one week as a holiday; the agreement was silent as to holiday scheduling.

[108] *Pedlar People Ltd.*, *supra* note 107, at 328.

The board intimated that where normal output is not met, the onus is on the employees to give a legitimate reason as to why that is the case. Here, the reason was clearly illegitimate, in terms of the legislative scheme, because the campaign was intended to pressure the employer into maintaining the bonus. The case suggests that the use of words such as "slowdown", which are not expressed to be related to contractual obligations, may be construed so as to effectuate the legislative policy against in-term bargaining pressure, irrespective of obligations. Clearly the board's emphasis was on the motive for the drop in output, rather than on whether or not the employees were strictly obliged to maintain a certain level of production.

In summary, where the work to rule campaign has the purpose of compelling an employer to make bargaining concessions, there will always be a "strike" under the statute, and therefore under the collective agreement, for one of two reasons. Either the statute expressly defines "strike" as an interference with production, without reference to "work" obligations, or, in those provinces where the statutory definition does relate to "work", that word has a unique statutory meaning which encompasses the outlawing of in-term bargaining pressure, irrespective of strict obligations under the agreement. This view probably represents the law, although there are no cases squarely on point. Even if "work" does refer to contractually binding obligations, "working to rule" in the form under discussion will always involve breaches of the agreement in the senses suggested. Lastly, "working to rule", even if not a statutory "strike", may involve breach of the private "no-strike" clause if that is worded more broadly than the statute.

(b) *Work to Rule in Defence of Existing Contractual Rights*

In this situation the union's role is reactive in the sense that the campaign is introduced as a defensive measure to protect what the union views as the infringement of its legitimate rights under the agreement by management initiatives in the work process. For instance, management might introduce a new work rule where the agreement is silent on the matter and the union responds by refusing collectively to observe the new rule. Management might amend an existing rule and the union responds by continuing to observe the old rule. Management might issue work directives pursuant to an express article in the agreement and the union, which disagrees with the management's interpretation of the article in question, responds by working in accordance with what it understands the article to mean. Management might issue work directives and the union responds by refusing to comply because there is an article in the agreement which, in the union's opinion, gives it the right to refuse to do the work either absolutely or (more commonly) until certain procedural steps in the agreement have been exhausted. It would be misleading to categorize these situations as invariably divorced from the negotiation of interest disputes. For instance, the management initiatives may often be

undertaken to maximize "stockpiles" in the face of impending bargaining and possible economic conflict. The union response, although framed directly in the context of the prevailing collective agreement, will almost certainly be projected towards the parties' relative bargaining strengths. Similarly, the management at plant *A* might seek to increase production in order to counteract the impact of a legal strike at plant *B* and the union response may be aimed at assisting the strikers at plant *B*.

The first situation for consideration is where management introduces a new rule in respect of a matter upon which the collective agreement and existing rules are silent. A concerted refusal to perform the new work will normally constitute a "strike" in all jurisdictions.

In provinces where the definition refers to "work", and assuming that "work" means contractually binding duties, employees who refuse to obey the management directives will be *prima facie* guilty of insubordination. It is established that management has the right under the agreement to promulgate new work rules and that employees are liable to discipline for disobedience thereof. Arbitral jurisprudence has also established that new rules must not be inconsistent with the collective agreement, must not be unreasonable in content, must be clear and unequivocal and must be brought to the attention of employees in advance before disobedience will justify discipline.[109] If the union seeks to justify its campaign of non-observance on the ground of alleged non-fulfillment of one or more of those conditions, that would not make any difference because of the principle "work now — grieve later", which holds that employees must obey orders there and then and test their legality subsequently in the grievance and arbitration procedures. If one of the exceptions to "work now — grieve later" applies,[110] it is more

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[109] *See* note 94 *supra*.

[110] The exceptions to "work now — grieve later" arise in the following instances: first, where the order would involve, if obeyed, the commission of a crime or breach of statute; secondly, where compliance would endanger the health and safety of employees; thirdly, where the grievance procedure would be otherwise inadequate if exhausted; and fourthly, where the order is in flagrant and manifest breach of the agreement. The second exception is specifically excluded from the "strike" definition in s. 83(3) of the Labour Code, R.S.B.C. 1979, c. 212 and s. 1(1) of the Industrial Relations Act, R.S.N.B. 1973, c. I-4. The limits of the third exemption have yet to be fleshed out. For instance, would it apply in "contracting out" grievances where exhaustion of procedure while work is moved out to the unit may irreparably damage the interests of the unit? It has been held to apply where union officials have disobeyed orders because of the necessity of representing effectively the union and employees in contract administration (*e.g.*, *Re* Woodworkers, Local 2-500 and Stancor Cent. Ltd., 22 L.A.C. 184 (Weiler, 1970)) and in other "perishable" disputes such as the scheduling of holidays (*e.g.*, *Re* Canada Valve Ltd. and Molders, Local 279, 9 L.A.C. (2d) 414 (Shime, 1975)). Further, the collective agreement may expressly provide for *status quo* clauses which establish exceptions to the principle, although these are rare. The limits of the fourth exception are also vague. The only reported case is *Re* British Columbia Tel. Co. and Telecommunications Workers, 15 L.A.C. (2d) 426 (Larson, 1977) where it was stated:

> There are limits to the kinds of orders a supervisor may give. Where the language of a collective agreement is so clear that it could not reasonably admit of a dispute about it, I cannot see why an employee should be required

debatable whether the campaign would involve breaches of obligations for the purpose of constituting a "strike". There is no question that the individual employee will be justified in disobedience if one of the exceptions applies to him: but would the added element of concert transform otherwise permissible *personal* disobedience into illegal activity? If so, the apparent paradox arises whereby the individual may face discipline for participation in a "strike" when he has the personal right not to obey the very same order. The answer may depend in part on why the individual has the right to disobey. If the order is illegal in the sense of involving the employee in the commission of a crime or violation of some other statute, then the order is presumably null and void because contrary to public policy. There can be no individual breach of a legally non-existent order. If the order is illegal in the sense of being in breach of the collective agreement and the position is such that "work now — grieve later" would be inapplicable, such an order would probably not be a nullity as contravening public policy, although it would clearly give rise to remedies under the agreement. The collective agreement is essentially a private contract between the parties under which they are largely, but not totally, free to impose mutual rights and obligations of their own making. In this sense, collective agreements differ from criminal and general statutory law which imposes standards authored by society as a whole. However, assuming that an order which merely violates the agreement is not a nullity, it may nonetheless be possible to find employee breach notwithstanding that the disobedience is within the exceptions to "work now — grieve later". It is established that there is a two-way duty of reasonable administration of the collective agreement. If the purpose of the employees' concerted disobedience is, for instance, to compel the employer to delay implementation of the order until after the next round of bargaining, this is arguably "unreasonable" ground for refusal because the employees are in effect setting up a "smoke screen" to subject management's rule-making powers to subsequent collective bargaining. This is also the case if the motive for disobedience is to exert pressure for some other bargaining demand on either the immediate employer or some secondary employer in dispute with its employees. Conversely, if the employees' purpose is a *bona fide* attempt to protect themselves from illegal management orders, their refusal would be "reasonable" and they would be within the

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> to do something at variance with his rights. Certainly such circumstances would be rare. . . . But a supervisor may not contrive a dispute in order to compel an employee to do something at variance to his clear rights in the collective agreement.

Id. at 431. This should be contrasted with the more conservative classical formulation of "work now — grieve later" in *Re* Ford Motor Co., 3 L.A. 779 (Shulman), cited with approval in *Re* U.S.W. and Lake Ont. Steel Co., 19 L.A.C. 103 (Weiler, 1968). It remains to be seen to what extent this exception will be developed. *See generally* MacIntyre, *Work Now, Grieve Later*, in GRIEVANCE ARBITRATION: A REVIEW OF CURRENT PROBLEMS 18 (M. Hickling ed. 1977).

protected exceptions to "work now — grieve later". If this approach to the problem is correct, it must mean that motive is infused into the statutory definitions via the word "work". Only where the order is a nullity would motive be irrelevant in order to enable employees to blatantly disobey for collective bargaining purposes without being in breach of the agreement.

Assuming that "work" has a special statutory meaning in provinces which relate the definition to that word, concerted disobedience of the type in question would also normally constitute a "strike" because legislative policy establishes arbitration as the alternative to self-help for challenging the propriety of management actions. If the disobedience occurs in circumstances falling within one of the exceptions to "work now — grieve later", it is arguable that legislative policy should uphold the efficacy of those exceptions by not finding a "strike". Where compliance with the order would involve the commission of a crime or breach of some other statute, it is clear that such illegalities are not contemplated by the labour relations legislation as "work" and disobedience will not amount to a "strike". This would presumably be so notwithstanding that the disobedience is for blatant job regulation purposes. The illegal order is null and void and that should be the end of it. It is less clear whether the exceptions for unsafe work and inadequacy in the grievance and arbitration procedures are contemplated as "work", although the better view is that they should not be; otherwise those arbitral exceptions could be circumvented by a finding of "strike". Given the legislative preference for arbitration as the optimal method of dispute resolution, it would be undesirable for the legislation to impair the functioning of the process by undermining such well established arbitral principles. However, in the latter case the result would be different if the employees' real purpose is to set up a "smoke screen" to subject management rule-making powers to the collective bargaining process. Here, the employees will in fact be subverting the statutory policy against in-term bargaining pressure. For instance, the employees might be attempting to establish as a current term or condition of employment that the new work need not be performed until after the next round of bargaining. This is clearly illegitimate in terms of legislative policy. Again, motive is necessarily infused into the statutory definition.

In provinces which require only an interruption of production, the type of campaign in question will normally constitute a "strike". There appears to be a literal interruption of production even if the employees are within one of the exceptions to "work now — grieve later" and even if their true purpose is self-defence rather than the establishment of a "smoke screen" for collective bargaining purposes.[111] It would surely be

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[111] In Tahsis Co. and Woodworkers, Local 1-85, [1979] 2 Can. L.R.B.R. 377 (B.C.L.R.B.), the board intimated that disobedience in the type of campaign under consideration here is not only "an act or omission that is intended to, or does restrict or limit the production of services" but is also "obviously...a 'refusal to work' ". *Id.* at 381.

incorrect to construe formulae such as "designed to restrict or limit output" as meaning "designed to restrict or limit *existing levels* of output".[112] That would allow the union to block *any* management initiatives to increase production. However, there are several possible safeguards against an automatic finding of "strike" where the employees' actions fall within the exceptions to "work now — grieve later". First, if the management order would involve the commission of a crime or breach of statute, there is authority that concerted disobedience would not constitute a "strike" under the statute and the collective agreement[113] because management's rule-making powers would be illegal, and therefore null and void, in this situation. Words like "output" in the statutes mean "output" that would result from the "lawful" issuance of management orders. "Lawful" means, at the least, not in breach of the criminal law or statute. Significantly, it would seem to follow that the employees' motive for disobedience is irrelevant so that they could openly utilize disobedience as a bargaining weapon. However, it is unlikely that "output" would be construed as excluding that which results from orders unlawful in the sense of violating the collective agreement, even though the employees are within the other exception to "work now — grieve later".

A second possible safeguard suggested by the Ontario Board decision in *Ontario-Minnesota Pulp & Paper Co. v. Lumber Workers, Local 2693*[114] is the denial of discretionary cease and desist orders. In that case the board indicated that it may not grant the remedy where the union's action is in response to initiatives of the employer which cannot "reasonably" be said to be within the latter's rights under the agreement. It is strongly arguable that relief would also be denied where the exceptions to "work now — grieve later" are involved, so as to avoid undermining those accepted arbitral principles upon which the parties' expectations are based.

A third safeguard where the disobedience falls within the exceptions to "work now — grieve later" is the possibility of a finding of no "concert". If the case falls within the excepted categories, this would be evidence of each employee acting for individual self-protection, although other circumstances establishing "concert" might obviously be present.

In provinces with the subjective purpose component to the statutory definition, the type of work to rule under consideration would normally satisfy that component. At the least, the employees' purpose could be said to be the establishment of a condition of employment that the new work does not have to be performed until termination of the next round of

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[112] The Labour Relations Act, R.S.O. 1970, c. 232, s. 1(1)(*m*).

[113] *E.g.*, *Re* Kimberly-Clark Ltd. and Papermakers, Local 256, 3 L.A.C. (2d) 278 (Brown, 1973); *Re* National Grocers Co. and Retail Workers, Local 427, 16 L.A.C. (2d) 302, at 306 (Weatherhill, 1978); *Re* Atomic Energy of Canada Ltd. and Atomic Workers, Local 1541, 18 L.A.C. (2d) 302, at 306 (Weatherhill, 1978); *Carling O'Keefe Ltd.*, *supra* note 86; Paperworkers, Local 1150 and Cameron Packing Inc., [1979] 2 Can. L.R.B.R. 557, at 564-65 (Davis).

[114] *Supra* note 88.

bargaining or exhaustion of the grievance and arbitration procedures.[115] *A fortiori*, this would be the position if the disobedience is a cloak for the achievement of other bargaining demands. If the individual refusal falls within the crime or statutory illegality exceptions to "work now — grieve later", presumably there can be no "strike" for the reasons given earlier, irrespective of the employees' motive. However, in provinces other than those with the objective model, the purpose component could be utilized to find that there is no "strike" where the other exceptions to "work now — grieve later" are involved[116] on the ground that the employees' motive is not to force concessions, but self-defence against clear management abuse of its rule-making powers. The purpose component would, of course, be satisfied if the employees' real motive is to achieve bargaining demands.

The second situation for consideration is where management introduces an amendment to an existing work rule which does *not* comprise part of the collective agreement, and the employees respond by continuing to work in accordance with the old rule. The position will be the same as that described above. However, the position may differ in provinces with the subjective component in the statutory definition if the work rule in question is frozen by the collective agreement so that it becomes in effect a term of the agreement. This is the same as the employer purporting to amend unilaterally an express article of the agreement. The employees' purpose in refusing to obey the order is *prima facie* to assert their collective agreement rights, not to pressure the employer into making concessions.[117] The employer has conceded the

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[115] *See Tahsis Co., supra* note 111, at 381-82.

[116] This possibility has not been canvassed in any of the reported cases from the subjective model provinces.

[117] There is authority to support this approach. *See, e.g., Tahsis Co., supra* note 111, at 382-83. In Government of B.C. and B.C. Gov't Employees' Union, [1978] 1 W.L.A.C. 378 (Monroe, 1977), the crew of a ferry walked off the job because a first aid attendant was not assigned to the ferry. The employees acted on the advice of a union official to the effect that they had the right under safety provisions in the agreement to refuse to work. In fact, the official's interpretation of the provisions was incorrect. It was held that the walkout did not constitute a "strike" because the employees' purpose was to exert a right under the collective agreement, even though the official's interpretation of the agreement turned out to be wrong. Moreover, the arbitrator suggested that, even in the absence of such provisions, a walkout for safety reasons falling within that exception to "work now — grieve later" would not be a "strike" for want of the requisite illegitimate purpose (though on the facts of this case the safety exception did not apply). In *Carling O'Keefe Ltd., supra* note 86, at 6, the Alberta Board of Industrial Relations seemed to hold as an alternative ground for a finding of no "strike" that the requisite illegitimate purpose was not present. The Board's decision in this regard is not crystal clear. It could be that the Board based this ruling on lack of "concert" rather than on the purpose limb, though this would be surprising since the facts did point to "concert". Presumably the employees' purpose was to insist on their contractual rights to refuse overtime in any other than "pressing emergencies". In *Winnipeg Teachers, supra* note 33, at 683, Laskin C.J.C. stated that teachers who refuse to perform duties pursuant to the disputed rule would not be on "strike" unless they actually walked off the job to support their interpretation of the disputed rule. Although

particular right to the employees, and it cannot subsequently complain of the economic losses which result from the concession. This would only apply if there is no dispute between the parties as to the meaning of the provision in question; otherwise the employees' motive would be illegitimate in that they would be attempting to compel the employer to accept as a condition of employment *their* interpretation of the provision.[118] Since the purpose component establishes a subjective legal standard, it would presumably suffice for the employees to honestly believe that the provision is clear and unambiguous even though their belief turns out to be erroneous. Objective proof will be relevant in assessing the *bona fides* of their belief, so that the potential for abuse is safeguarded to some extent.[119] Thus, if the employees' interpretation is one which is grossly unreasonable, or if there is other evidence of a "smoke screen" for concessions in other areas, then this will go towards establishing an improper purpose.

The third situation is where the collective agreement provides for a procedure to be followed before management can make changes in the work process, or provides that employees have the absolute right not to perform certain tasks. In provinces with the subjective component, the employees' *prima facie* purpose is to assert existing contract rights, not to force new concessions (even though new concessions might be the indirect consequence of insistence on the immediate right), so that, absent other evidence of an illegitimate motive, there is no "strike". In *Tahsis Co. and Woodworkers, Local 1-85*, the collective agreement contained the following clause:

> *Article 1.2(g) Changes in Facilities and Methods*
> The company will give the local union notice of major changes in production facilities and methods in ship loading and barge-loading. Where the introduction of these changes affects the provisions of Supplement No. 7 the

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this is not made clear, the reason is presumably that the teachers' purpose would be to exert what they perceive to be their contractual rights, so that the subjective component of the "strike" definition in s. 384(2) of The Public Schools Act, R.S.M. 1970, c. P250 (incorporating the definition of "strike" in The Labour Relations Act, S.M. 1972, c. 75, s. 1(v)) would not be satisfied. Also note the possibility of estoppel against the union where it has not enforced its strict contractual rights in the past and seeks to rely on them as a defence to an untimely "strike". In Craftsmen Floors (B.C.) Ltd. and Carpenters, Local 1541, [1980] 2 Can. L.R.B.R. 63 (B.C.L.R.B.), the B.C. Board issued a cease and desist order in such circumstances.

[118] In *Tahsis Co.*, *supra* note 111, at 386, the B.C. Board stated that there must be "no dispute over the meaning of the agreement". To the extent that *Carling O'Keefe Ltd.*, *supra* note 86, and the *dictum* of Laskin C.J.C. in *Winnipeg Teachers*, *supra* note 33, are based on the purpose limb, the contractual language being relied on by the employees in those cases seems extremely disputatious. The *Government of B.C.* case, *supra* note 117, is reconcilable with *Tahsis Co.* because the contract provisions in question expressly gave the union officials the right to interpret the safety rules for the purpose of refusal to work and such interpretation was not required to be correct.

[119] *Quaere* whether *Carling O'Keefe Ltd.*, *supra* note 86, and the *dictum* of Laskin C.J.C. in *Winnipeg Teachers*, *supra* note 33, go too far in favour of the employees. *See* the comments in note 118 *supra*. Of course, contractual language never falls into neat

> company agrees to negotiate with the local union regarding the affected provisions.[120]

Shiploaders refused to load a deep-sea barge when ordered, arguing that the order was in breach of the above provision and that management had to negotiate terms and conditions relating to the work in question before they were required to perform it. The employer responded by refusing to schedule midnight production shifts. The matter went to arbitration on the question whether the employer was in breach of other articles in the agreement by refusing to schedule the shifts. One of the employer's arguments was that the employees had engaged in an untimely "strike" within the meaning of the British Columbia Labour Code[121] and the collective agreement by disobeying the order to load deep-sea barges. The arbitrator upheld the union's position and found that there was no "strike" in light of article 1.2(g) cited above. In an application under section 108(1) of the Labour Code to the Labour Relations Board, the employer argued that the award was wrong in that the meaning of "strike" under the Code was interpreted incorrectly by the arbitrator. The board rejected the employer's argument on the ground that the arbitrator founded his award not on any misapprehension of the word "strike" in the Code, but rather on his interpretation of article 1.2(g) which he felt gave the employees the right to refuse performance of the work. The board also rejected the merits of the company's argument that there would be a statutory "strike" in these circumstances, on the ground that the purpose component would not be satisfied so long as the employees' motive was to exercise their rights under article 1.2(g). The board stated:

> Barring a dispute about whether this right to refuse exists at all, (and to repeat an earlier observation, such a dispute would be subject to arbitration), the employees are not seeking by the work stoppage to compel the employer to agree to their position as to what the collective agreement means. There is no dispute over the meaning of the agreement. Rather . . . the employees are merely asserting a right; they are not seeking to acquire a right. The character of the conduct is not changed because the collective agreement also expressly recognizes that in asserting those rights, the bargaining principals may agree to terms by which the employees acquire new rights as well as new obligations.
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> ... [A]ppropriate language in the collective agreement may entitle employees to refuse to perform work without rendering that refusal a strike. Contractual language which is sufficient to provide this result is not impaired if it expressly includes additional language making the right to refuse subject to further collective bargaining. Moreover, the kind of language necessary to accomplish this result is not an unlawful contracting out of the Code's absolute prohibition against mid-term strikes. That is because the existence of

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categories of "clear" and "unclear"; there will always be some ambiguity in the wording itself or in its application to particular facts. For instance, the fact that the employer sets up a "sham" dispute should not suffice.

[120] *Supra* note 111, at 383.

[121] R.S.B.C. 1979, c. 212, s. 79(1).

> the contractual language changes the character of the refusal to perform the work; the refusal ceases to have as its objective the kind of purpose which is contemplated in the definition of strike in the Code.[122]

In provinces with the objective component, collective agreement articles of this type will only be relevant insofar as they point to lack of "concert", constitute grounds for the denial of discretionary relief, or (less likely) result in a finding that no "work" or "output" scheduled as a result of the employer's flagrant breach entitled employees *immediately* to disobey the order rather than grieve.

To sum up, it is clear that there is very little scope for lawful self-defence which takes the form of a work to rule campaign in the objective component provinces. The union must rely primarily on the refusal of discretionary relief by the boards and courts once "concert" is established. Only where the orders are "illegal" in the sense of criminal and statute law will the union be certain of protection. The individual worker and his union may find little solace in the fact that the employer is denied, for reasons given earlier, a declaration, injunction or cease and desist order. It is far better to say that there is no "strike" in the first place.

This raises the question of the circumstances in which self-defence work to rule campaigns *should* be permissible. It is suggested that there should be no "strike" where management's order is in clear violation of the agreement or where the grievance and arbitration procedures would, if exhausted, provide illusory relief, provided always that the union is not setting up those criteria as a guise for obtaining concessions. It may be possible to achieve this by interpreting the word "work" in the purposive sense suggested, although it is doubtful whether this is compatible with the current authorities; this is so *a fortiori* if the additional references to disruption of "output", "production", *et cetera* appear. In this type of work to rule campaign it cannot be said that a finding of "strike" is compatible with the legitimate expectations of union and management based on custom and practice, as it would be where the campaign is utilized as a pure bargaining tactic. Absent the force of custom and practice, the only remaining rationale is the policy of guaranteeing the employer *total* freedom from concerted interference with its operations during the agreement. Whereas this policy has been stated to underlie the legislation in the objective model provinces, it must be remembered that the *quid pro quo* for the abrogation of its right to strike mid-term is intended to be arbitration. At the least, it can be argued persuasively that if arbitration acknowledges itself[123] to be deficient in defined areas, as it implicitly does when the grievance falls within the

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[122] *Supra* note 111, at 386-87.

[123] *Quaere* whether this argument holds good for negotiated *status quo* clauses which extend the ambit of the implicit exceptions to "work now — grieve later" Of course, if such a clause were present, the employees would seek to justify the disobedience as the legitimate exercise of non-disputatious contractual rights and the position would be that outlined in the text.

exceptions to "work now — grieve later", then the employer loses its expectation of uninterrupted production and the work to rule campaign is not incompatible with the legislation scheme. This result can be achieved under the more flexible subjective model of "strike", and for that reason it is suggested that the latter is to be preferred over the objective model.

2. *Overtime Ban*

A concerted refusal to perform overtime may be utilized offensively or defensively by the union. An offensive overtime ban occurs where the union seeks to pressure an employer into granting employment concessions. From the union's viewpoint, the membership continues to earn income while inflicting hurt on the employer, and the job action may be cosmetically more acceptable than a full-scale walkout. A defensive overtime ban may occur where the employer unilaterally schedules overtime in circumstances such that the employees believe the order to be in breach of the collective agreement or relevant employment standards legislation and they respond by refusing to comply with it. Also, an overtime ban is defensive when utilized for some other protective purpose; for example, to conserve employment opportunities for the work force as a whole so as to avoid lay-offs.

Offensive overtime bans should and do constitute "strikes" in all provinces.[124] The exertion of in-term bargaining pressure is the very mischief which the peace obligation seeks to eradicate. Moreover, there are no countervailing policies against such a result based on freedom of contract. The employer is not riding roughshod over the terms of the agreement. Where overtime is not expressed to be compulsory under the agreement, arbitrators generally hold that management has the right to require overtime, unless the agreement specifically provides that it is to be voluntary.[125] Where overtime is expressed to be voluntary, it could be

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[124] The following authorities are from objective component jurisdictions: Harding Carpets Ltd. and Textile Council, Local 501, 56 C.L.L.C. 1564 (Ont. L.R.B. 1956); Mobil Paint Co., (unreported, Ont. L.R.B., 10 Oct. 1974); Domtar Packaging Ltd. v. Paperworkers, Local 528, [1974] Ont. L.R.B.R. 899; Lorneville Area Projects Bargaining Auth. v. Journeymen, Local 213, 12 N.B.R. (2d) 354 (Q.B. 1975); *Re* Teamsters, Local 141 and M. Loeb (London) Ltd., 23 L.A.C. 215 (Hinnegan, 1971); *Re* U.S.W., Local 2950, and Greening Indus. Ltd., 22 L.A.C. 165 (Weatherill, 1971); *Re* Printing Specialties, Local 466 and E.S. & A. Robinson (Canada) Ltd., 21 L.A.C. 354 (Brown, 1970); C & C Yachts Mfg. Ltd. and Carpenters, Local 2737, [1977] 2 Can. L.R.B.R. 350 (Ont. L.R.B.); *Atomic Energy of Canada Ltd.*, *supra* note 113; Paperworkers, Local 1150 v. Cameron Packaging Inc., [1979] 1 Ont. L.R.B.R. 489. The following authorities are to the same effect in subjective component provinces: *Freightliner Ltd.*, *supra* note 91; *MacMillan, Bloedel (Alberni) Ltd.*, *supra* note 97; Brewery Workers, Local 300 and Molson Brewery B.C. Ltd., [1979] 2 Can. L.R.B.R. 552 (B.C.L.R.B.): *Re* Eurocan Pulp & Paper Co. and Papermakers, Local 298, 3 L.A.C. (2d) 190 (Blair, 1973). There are no reported Manitoba, Nova Scotia or Alberta cases on point, although it is submitted that the same position will prevail.

[125] *See Re Kimberly-Clark Ltd.*, *supra* note 113, and the authorities reviewed therein.

argued that if the individual has the right to refuse without breaching his obligations so, too, should a number of individuals. On the other hand, there is unquestionably a qualitative difference between an individual refusal for personal reasons and a collective refusal aimed at winning bargaining concessions.[126] The concerted refusal has as its very purpose the illegitimate objective of exerting mid-term bargaining pressure. In purely contractual terms, the exercise by each employee of his rights for such a purpose would surely constitute arbitrary, unreasonable and bad-faith application of the agreement and so be in breach. However, the problem with the "strike" definitions in the objective model provinces lies not in this result, but in the manner of reaching it. In those provinces, the problem becomes acute where the overtime ban is defensive.

It is submitted that defensive overtime bans should not constitute "strikes". If, for instance, the agreement provides unambiguous conditions precedent to the lawful ordering of overtime, which the employer disregards, it is unrealistic to view the insistence on such rights as a "strike". That would be to allow the employer to ride roughshod over the agreement and undermine the arbitral exception to "work now — grieve later", which would apply in this situation. Similarly, if employees in concert refuse overtime in order to avoid lay-offs where overtime is clearly expressed to be voluntary under the agreement, the reasonableness and *bona fides* of their motive should be tested in arbitration under the "just cause" clause rather than be totally submerged by a blanket finding of "strike". In this stituation, it is at least arguable that arbitrators would hold the reason for refusal to perform overtime to be reasonable and in good faith.[127] To hold such an overtime ban to be a "strike" is in effect to deny the employees the benefit of their discretionary right to refuse and their legitimate expectation that the *bona fides* and reasonableness of any refusal will be tested in arbitration. On the other hand, it is clear legislative policy that employees should not be allowed to utilize a "defensive" overtime ban as a "smoke screen" to exert mid-term bargaining pressure on their employer. The statutory definition of "strike" should be sufficiently flexible to accommodate the differing policy interests involved in those differing situations. Interestingly, there were indications in some of the pre-*Longshoremen* authorities that the definitions in the objective component provinces would not be applied as a blunt instrument in overtime ban cases, but rather would be applied in the mischief sense.

In *Harding Carpets Ltd. and Textile Council, Local 501*,[128] the Ontario Labour Relations Board, holding that a ban on voluntary overtime for negotiation purposes constituted a "strike", stated:

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[126] *See* Weyerhaeuser Canada Ltd. and Woodworkers, Local 10, [1976] 2 Can. L.R.B.R. 41, at 45 (B.C.L.R.B.).

[127] *Cf. Re* Electrical Workers, Local 566 and J.A. Wilson Display Ltd., 19 L.A.C. 352 (Johnston, 1968).

[128] *Supra* note 124.

> To further the policy of the legislation, then, concerted action by one of the parties, . . . which has for its sole purpose the compelling or inducing of the other party to the negotiations to make concessions or to abandon privileges which it presently enjoys should, unless a contrary intention is indicated in the Act, be treated as falling within the mischief for which the legislation was designed to provide a cure.[129]

This clearly envisages an illegitimate purpose component. The same view is also apparent in a recent decision of the New Brunswick Queen's Bench Division involving overtime bans by six locals under different collective agreements. In *Lorneville Area Projects Bargaining Authority v. Plumbers, Local 213*, Dickson J. stated:

> The law is in my view well settled that even where a collective agreement contemplates overtime work but does not spell out an obligation on the part of the employees to work overtime at the request of the employer, a concerted refusal on the employees' part to work overtime, which materially interferes with production *and which is intended to compel the employer to agree to revised terms and conditions of employment provided for in the collective agreement, constitutes a strike*.[130]

In that case, all the overtime bans were held to be "strikes" notwithstanding that four of the collective agreements expressed overtime to be voluntary. Where overtime is expressed to be voluntary, arbitrators have looked to the legitimacy of the employees' purpose under the mischief principles in determining whether there is a "strike" under the agreement. In one Ontario award involving a ban on voluntary overtime imposed in order to speed up management responses in bargaining, the arbitrator rationalized his finding of a "strike" as follows:

> Perhaps one, ten or even all of the employees could refuse at a particular time for their individual reasons, but when all of them refuse all the time over a long period of time, knowing that such work is necessary, then it cannot be held that they have co-operated as they undertook to do, but rather they have acted in concert for the real purpose of placing pressure on the company during negotiations.[131]

In another Ontario award involving similar facts, the arbitrator reviewed the union's purpose and concluded that there was a "strike" because that purpose was "just the sort of activity or 'mischief' the collective agreement, and the *Labour Relations Act*, . . . were designed to prohibit".[132] In the most recent award on point, this time occurring within the federal jurisdiction, the arbitrator emphasized the illegitimacy of the union's collective bargaining purpose in reaching his decision that

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[129] *Id.* at 1566-67. Contrast the earlier decision in John Inglis Co. and U.S.W., Local 2900, 53 C.L.L.C. 1438 (Ont. L.R.B. 1952) which appears to ignore the mischief/purpose element in favour of an approach based on pure contractual obligations.

[130] *Supra* note 124, at 357 (emphasis added).

[131] *Re Printing Specialties, Local 466*, *supra* note 124, at 356-57.

[132] *Re U.S.W., Local 2950*, *supra* note 124, at 168.

there was a "strike", but added that the purpose element "may not be necessary".[133] In the same award, the arbitrator also emphasized that the employer's request "does not appear to have been contrary to any applicable legislation and was certainly within the contemplation of the collective agreement. In refusing overtime, employees do not appear to have suggested that it was in any way illegal or improper."[134] It is established that there can be no "strike" where the overtime work would violate provisions of the employment standards legislation.[135] However, this *dictum* goes further in suggesting that there may be no "strike" if the order is "improper" in the sense of violating clear provisions in the collective agreement which either absolutely prohibit overtime or, more likely, lay down conditions precedent to its performance. The implication is that the employer cannot utilize the peace obligation to ride roughshod over clear terms of the agreement, *i.e.*, the classic defensive overtime ban whose purpose is to prevent blatant abuses of its reserved rights. It is notable that in the *Lorneville* case, Dickson J. treated as the "essential and significant fact"[136] that all collective agreements contemplated ovetime, thereby suggesting that had they manifestly *not* contemplated its performance, there would be no "strike". Similarly, in *MacMillan, Bloedel (Alberni) Ltd.*,[137] Taggart J.A. of the British Columbia Court of Appeal, while stating that the defence of pure contractual obligations cannot avoid a finding of "strike" under a mischief construction of the word "work", nonetheless emphasized, "I am far from saying that the provisions of a collective agreement are never relevant in resolving the matters which may be in issue between the parties. . . ."[138] Presumably His Lordship was considering the case of the defensive overtime ban, although he did not make this clear. In one of the earliest Ontario Labour Relations Board decisions on point, *John Inglis Co. and U.S.W., Local 2900*,[139] the board seemed to take an

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[133] *Re Atomic Energy of Canada Ltd.*, *supra* note 113, at 306.

[134] *Id.*

[135] *See* the cases cited in note 113 *supra*.

[136] *Supra* note 124, at 357.

[137] *Supra* note 97, overruling Dryer J. on this point, who had stated:

> It is not, in my opinion, all work or any work, a cessation or refusal of which will constitute a strike, but only such work as comes within what the employee was employed to do. A refusal of employees in concert or otherwise to perform services different in content or demand from those ordinarily performed by them under the contract of employment would not constitute a strike regardless of purpose.

71 W.W.R. 561, at 563 (B.C.S.C. 1969). Note that this case involved the interpretation of the Mediation Commission Act, S.B.C. 1968, c. 26, s. 2(1) (*replaced by* S.B.C. 1973 (2d sess.), c. 122), which contained the subjective component. The view of Dryer J. was accepted in England under the now defunct Industrial Relations Act. *See, e.g.*, Seaboard World Airlines v. Transport Workers, [1973] I.C.R. 458, at 460 (Nat'l I.R. Ct.). *Cf.* Camden Exhibition & Display Ltd. v. Lynott, [1966] 1 Q.B. 555, [1965] 3 All E.R. 28 (C.A.).

[138] *Supra* note 97, at 594, 13 D.L.R. (3d) at 750.

[139] *Supra* note 129.

approach which was based exclusively on contractual obligations and ignored the mischief element altogether. The board stated that an overtime ban would not constitute a "strike" under the Act if the collective agreement prohibited overtime, established conditions precedent to its performance which had not been fulfilled, or if the employer otherwise did not have the express or implied right to assign it. Insofar as the decision made relevant the contractual rights of employees, it is sound. However, insofar as it suggested that such rights are a complete defence where the employees' purpose is to utilize them as a cloak to exert mid-term bargaining pressure, it is submitted that the decision is unsound in ignoring the legislative policy against this type of conduct. In any event, the case is very weak authority and is unlikely to be resurrected.[140]

It must be doubted seriously, however, whether *any* of the authorities cited above can be said to apply after the decision of the Supreme Court of Canada in the *Longshoremen's* case.[141] One possible distinguishing feature is that this case did not involve consideration of whether the exercise of contractual rights would negate a finding of "strike". There was no issue, for instance, of a right to honour picket lines' clause in the agreement. Thus, where an overtime ban occurs and the agreement contains provisions deeming overtime to be voluntary, or establishing pre-conditions to its lawful assignment, it may still be possible to argue that the Supreme Court of Canada's *dictum* that purpose is irrelevant, broad as it seems on its face, is not intended to apply on a blanket base — especially where the legislative policy of promoting arbitration is brought into issue. If that is not possible, so that words like "work" and "output" cannot be construed purposively, the employees' only protection in those provinces in respect of legitimate defensive overtime bans is the boards' and courts' refusal of discretionary relief.

In jurisdictions with the subjective component, on the other hand, the "strike" definition is sufficiently flexible to allow authorities to distinguish between overtime bans which are or are not compatible with the policy underlying the statutory peace obligation. Most of the recent cases have arisen in British Columbia. In other jurisdictions it is debatable to what extent, if any, the purpose component remains as an operative part of the definition after the expansive construction given to the word "includes" which prefaces the "strike" definitions.[142] With the exception of one case in Alberta, no recent reported decisions exist in those provinces on the legal status of overtime bans.

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[140] Thus the board did not make a ruling on the "strike" issues, but remitted the case to arbitration, because the board considered that it did not have jurisdiction to interpret the collective agreement under the guise of the statutory "strike" ban. This is clearly wrong. *Contra* the approach of the B.C. court in *Re* Marine Workers, Local 1 and B.C. Lab. Rel. Bd., 4 W.W.R. 529, [1952] 2 D.L.R. 63 (B.C.S.C. 1951) and of the Alberta Board of Industrial Relations in *Carling O'Keefe Ltd.*, *supra* note 86.

[141] *Supra* note 49.

[142] *See* note 52 and accompanying text *supra*.

In *Weyerhaeuser Canada Ltd. and Woodworkers, Local 10*,[143] the British Columbia Labour Relations Board had occasion for the first time to formulate a general statement on the legality of overtime bans under the Code's "strike" definition. In that case the union argued that if overtime was expressed to be voluntary under the agreement, or the agreement otherwise gave a right of refusal, a concerted ban could *never* amount to a "strike" since there is no refusal to "work" in the sense that employees have the right not to work. The union did not argue that there would be no "act or omission that is intended to, or does limit or restrict production or services",[144] and the board in *Weyerhaeuser* did not address that question. However, in the later case of *Brewery Workers, Local 300 and Molson Brewery B.C. Ltd.*, the board clearly considered that an overtime ban could fall under both the "work" and "act or omission" heads.[145] Thus, even if the union were correct in its submission as to the meaning of "work", it could nonetheless fall afoul of the "act or omission" head on a literal construction.

The board in *Molson Brewery* rejected the union's submission as to the meaning of "work", stating that no one component of the definition could be singled out from the rest, so that "work" is coloured by the mischief which the whole section is designed to cure.[146] In effect, the board subsumes the "work" head within the wider subjective component, so that if the real purpose of the ban is to pressure an employer into making employment concessions, there is a "strike" notwithstanding that the employees may be exercising an unambiguous contractual right to refuse. Conversely, if the real purpose of the ban has nothing to do with forcing employment concessions, there would be no "strike" notwithstanding that performance is compulsory under the agreement.[147] In that situation, the employer would have to pursue its remedies in arbitration against the union and individual participants for breach of the collective agreement. Presumably there would be no "strike", irrespective of a blatantly illegitimate purpose, if the overtime were to violate provisions of the labour standards legislation, because the employer's order is a nullity. That question has never arisen in British Columbia, although the Alberta Board of Industrial Relations has recently ruled that there would be no "strike".[148]

In *Weyerhaeuser* itself, the board did not have to make a ruling on whether the subjective component was satisfied, since the particular

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[143] *Supra* note 126.

[144] Labour Code, R.S.B.C. 1979, c. 212, s. 1(1)(*d*).

[145] *Supra* note 124, at 553. *See also* the early view of the Ontario Board in *John Inglis*, *supra* note 129, at 1440.

[146] *Supra* note 124, at 554-55.

[147] This is suggested in *Weyerhaeuser*, *supra* note 126, at 47.

[148] *Carling O'Keefe Ltd.*, *supra* note 86. Note, however, that in this case the board found that the overtime ban was not imposed for an illegitimate purpose. If the opposite were true, there would be no "strike", it is submitted, by analogy with *Re Kimberly-Clark Ltd.*, *supra* note 113, at 285.

dispute had become submerged within an industry-wide work stoppage. However, subsequent cases demonstrate that the subjective component can result in different conclusions in given situations, with respect to a finding of "strike", than would be reached in the objective model provinces.

First, where overtime bans are imposed to spread employment opportunities, they have been held not to amount to "strikes". In *Otis Elevator Co. and Elevator Constructors, Local 82*,[149] the company had subcontracts to install elevators in two Vancouver construction projects. The main contractor desired to complete the project early and therefore requested the company to bring forward the completion date of its elevator installations. In order to comply with this request, the company had to request its employees to perform increased overtime work, which was voluntary under the collective agreement. The union refused to perform any overtime work with respect to the new completion deadline, giving as its reason its desire to preserve work for its members and prevent potential lay-offs. The background was that construction industry collective agreements were about to expire. Not surprisingly, the normal practice was for a general fall-off in new construction projects until new agreements were concluded and industrial peace guaranteed. At that stage, work generally picked up again. However, since elevator installers only go in at the end of a project, the effect of a work pick-up would be felt later by elevator workers than by others. The union therefore claimed that its motive was legitimate — to conserve work pending the general pick-up. The board accepted this argument and held there to be no "strike", even though an indirect, but foreseeable, consequence of preserving the overtime work was to improve potentially the union's bargaining power in the event of economic conflict with its employer.

The board considered the hallmark of illegitimate purpose to be "activity which is calculated to bring an economic response from the employer".[150] In this case, the hallmark was absent. In the words of the board:

> When the end is properly an objective of negotiations, the activity is proscribed on the basis that pressure may only be exerted in a legal strike under the Code. But here the implementation of the ban in and of itself achieved the object the Union sought — preservation of work for some future date. No response was required from the employer who was not envisaged as part of the solution which the Union decided to seek. In short, there was no response sought or required from the employer which might improve the position that the Union had already adopted.[151]

The board considered that the indirect but foreseeable consequence of improving the bargaining position of the union was irrelevant once the union's true motive was established to be work preservation. Such a

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[149] *Supra* note 91.
[150] *Id.* at 69.
[151] *Id.*

consequence would raise inferences as to the *bona fides* of the union's alleged motive, but once the inference was overcome then the consequence would be irrelevant. In a passage that clearly demonstrates the board with its finger on the pulse of relative bargaining strengths, the board stated that to hold the opposite would mean that employers could lawfully stockpile in anticipation of a strike/lockout while denying the equivalent right to the union.[152]

In contrast, the board held an overtime ban aimed at compelling the employer to recall certain workers on lay-off to constitute a "strike" in *Freightliner of Canada Ltd. v. Industrial Workers, Local 14*.[153] The board rejected the union's argument, based on *Otis Elevator*, that there was no illegitimate purpose since the objective of the ban was to preserve work by spreading it among laid-off employees. The board held that the union's purpose was to compel the employer for the duration of the agreement to fetter its powers under the management rights article to assign overtime while other workers are laid off, which was illegitimate. According to the board, the "acid test" of whether a particular union objective is illegitimate is whether "it can reasonably be stated that the objective is one which can be established and administered through provisions in a collective agreement".[154]

Secondly, where the overtime ban is defensive in the sense of responding to management orders which violate unambiguous provisions of the agreement relating to the assignment of overtime, the board would likely hold there to be no "strike" since the union's purpose is to exert existing rights, not to create new ones. Although there are no cases squarely on point, the board has intimated to this effect in *Weyerhaeuser*,[155] and such a result would appear to follow by analogy with board comments in the *Tahsis*[156] decision. In that situation, the legality of the parties' respective action would have to be tested in arbitration. Thus the employer could not benefit under the statutory "strike" ban from having the extra work performed when, in arbitration, the employees could well be justified in refusing immediate obedience under the *B.C. Telephone*[157] exception to the "work now — grieve later" principle.

It should not be concluded from the foregoing that the board will find too readily the employee's motive in imposing overtime bans to be legitimate. Although improper motive will be evidenced if the union is seeking to win a concession in respect of a very specific employment item, it can also be present in regard to more nebulous demands. For instance, in the *Molson Brewery* case, employees imposed a ban on weekend overtime because, in counsel's own words, the employees were

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[152] *Id.* at 69-70.
[153] *Supra* note 91.
[154] *Id.* at 14,151.
[155] *Supra* note 126, at 47.
[156] *Supra* note 111.
[157] *Supra* note 110.

simply "pissed off".[158] The cause of that mental state was apparently management's attitude, management's harrassment of workers and overall low employee morale. The board held that there was a "strike" in these circumstances. The employees' motive was not only to express dissatisfaction to management, but contained the implication that if management were to clean up its act, the ban would no longer be imposed.[159] Interestingly, the board's remedy included not only an order that the illegal "strike" cease, but also the appointment of a Special Investigator at the motion of the board under section 97 of the Labour Code[160] to inquire into the causes of the problems and to attempt to resolve them voluntarily.

In other subjective component jurisdictions, it remains to be seen whether enough remains of the purpose element to transpose the British Columbia approach into those jurisdictions. In Alberta, a recent decision of the Board of Industrial Relations suggests that the purpose component may still breathe life in the context of overtime bans.[161] In that case, the collective agreement provided that the company could schedule certain overtime work as mandatory in "pressing emergency". In fact, the employer did not have the requisite consent of the board to schedule the work in question as required by section 23 of The Alberta Labour Act, 1973.[162] The board held that the concerted refusal did not constitute a "strike". The board seemed to base its decision on two grounds. First, the employer's order contravened section 23 and was therefore a nullity. This is non-contentious and the same result would be achieved in the objective component provinces. Secondly, and more significantly, the board stated that there was no "strike" "*notwithstanding*"[163] the first ground because there was no evidence of concerted activity undertaken in an effort to pressure the employer into granting employment concessions. Although the board's reasoning on this second ground is somewhat terse, it appears that the board considered the words "pressing emergency" in the collective agreement, construed them as meaning the same as those matters in section 23, and decided that since there was manifestly no "pressing emergency" there could be no "strike". This looks very much as if the board is matching the British Columbia approach of saying that there is no illegitimate purpose where the employer's true motive is to exert clear existing contract rights. To that extent the board's decision is significant in that it potentially leaves the door ajar in Alberta for the application of such decisions as *Otis Elevator*[164] in the context of overtime bans. Furthermore, it must now be open to question whether the board's previous approach to other concerted work stoppages (such as

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[158] *Supra* note 124, at 554.
[159] *Id.* at 555.
[160] R.S.B.C. 1979, c. 212.
[161] *Carling O'Keefe Ltd.*, *supra* note 86.
[162] S.A. 1973, c. 33.
[163] *Supra* note 86, at 6.
[164] *Supra* note 91.

honouring picket lines[165]) of simply asking the questions whether there is a work interruption and a current collective agreement, will be subject to remodification in the light of an active subjective component.

In summary, overtime bans of the offensive variety will invariably constitute "strikes" in both subjective and objective component provinces, except where the overtime order is repugnant to provisions of the employment standards legislation. This is a sound result in terms of the legislative policy against mid-term "bargaining stoppages". However, the process by which that desirable result is achieved is open to criticism in the objective provinces insofar as it consists solely of a literal interpretation of the objective components, without reference to the purpose of the overtime ban and the mischief of the statutory peace obligation. Unless such reference is made, the result is undesirable in the context of defensive overtime bans, which would invariably constitute "strikes" on a literal construction. There are indications in some of the authorities that a purposive construction might result in a finding of no "strike" in those circumstances, but the validity of those suggestions must be doubted after the decision of the Supreme Court of Canada in the *Longshoremen's* case.[166] If a literal construction is mandatory after that case, then the employees' only protection is the possibility that the boards and courts not grant discretionary remedies to the employer. In contrast, the subjective element of the "strike" definitions in Nova Scotia, Alberta, Manitoba and British Columbia allows for a more flexible approach which can accommodate the competing policies involved. Thus defensive overtime bans will not *prima facie* constitute "strikes" in those provinces, as long as the word "includes", which prefaces definitions, is not construed so as to negate the purpose component.

3. *Refusal to Cross Picket Lines*

Whether the statutory peace obligation should encompass the honouring of picket lines of another lawfully striking union involves two fundamental policy considerations. The first is the impact of a back-to-work order on the striking union's interest in maximizing its bargaining strength in the economic battle against its own employer. The second consideration is the permissable ambit of collective freedom of contract between the employees who honour the line and their employer.

As to the first, the possibility that workers who honour picket lines may be ordered to terminate an illegal "strike" obviously affects the relative economic strengths of the primary combatants. The primary employer may have no way of stopping the legal strike itself, but it can potentially erode its efficacy by attempting to have other workers who honour the lines ordered back to work. For the legislation to confer with

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[165] *See* note 182 and accompanying text *infra*.

[166] *Supra* note 49.

one hand, expressly or implicitly, a right to picket lawfully, only to remove it with the other, is to readjust the delicate point of balance against the union. This is internally inconsistent! It is therefore suggested, as a minimum, that honouring picket lines that are lawfully imposed by the striking union should not constitute a "strike" under the legislation. Furthermore, it is suggested that honouring picket lines should not constitute a statutory "strike" even where the picket line is itself unlawful. As was suggested earlier,[167] the concept of "strike" is properly understood in the statutory scheme as a device for obtaining employment concessions from the striker's *own* employer, not as a "catch-all" for *any* concerted work stoppages that may occur during the lifetime of the collective agreement. The latter are properly the concern of the collective agreement and the grievance and arbitration procedures therein, not of the statutory peace obligation. Rather, the illegal picketing itself can be enjoined in this situation without placing the onus on the picketed workers to determine the legality of the line — no easy matter under highly complex picketing laws — before they make their decision to cross.

As to the second consideration, collective freedom of contract, it is submitted that if the union wins a clause in the collective agreement entitling it to respect picket lines, then this strengthens the argument against holding its conduct to be a statutory "strike". In 1979, 10.5 per cent of collective agreements covering over 500 employees contained such clauses.[168] As was seen earlier,[169] the joint rule-making aspect of collective bargaining is a feature cherished by the system and is not to be abrogated lightly. Whereas collective agreement clauses which unambiguously violate statutory provisions should be avoided as against public policy, this should only occur when the repugnancy is manifest. There is no such repugnancy, it is suggested, between honouring picket lines and respecting the statutory peace obligation. To allow the employer to undercut its bargain with the union and renege on a commitment for which the union will undoubtedly have made other concessions is blatantly unfair to the union and flies in the face of both sides' expectations. It would take the strongest legislative mandate to produce such a result. Instead, the system contemplates that the efficacy of the clause should be tested in arbitration, not bludgeoned out of existence by an unrefined literal application of the statutory "strike" ban.

Assuming that the collective agreement does not contain a "right to honour picket lines" clause, another question is whether the union should have that right automatically implied in the collective agreement on "public policy" grounds in order to protect against private remedies of the employer. The argument in favour rests upon the implicit "right"

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[167] *See* p. 526 *supra*.

[168] QUEEN'S INDUSTRIAL RELATIONS CENTRE, THE CURRENT INDUSTRIAL RELATIONS SCENE IN CANADA 1979, 455 (W. Wood & P. Kumar eds. 1979).

[169] *See* p. 524 *supra*.

of the picketing union to have its line respected, irrespective of the private arrangements between other parties to be affected by it. There is no such "right". Whereas the *statutory* peace obligation should not circumvent the union's freedom to picket lawfully, it must be remembered that the system does not envisage the union as necessarily *succeeding* when it applies its economic weapons; the union merely has the power to utilize them without the statutory peace obligation undermining its efforts. The likelihood of other unions honouring its picket lines is just another variable in the balance of bargaining power which the striking union must assess before it engages in combat.[170] To reach the opposite conclusion would abrogate the freedom of contract and legitimate expectations of secondary unions and employers. The parties to collective agreements presume that work will be performed, and a large part of collective agreement provisions is concerned with detailing the exceptions. The system considers work stoppages of this "non-bargaining" nature, in which the statute remains neutral, to be matters for voluntary regulation by the parties.

Of jurisdictions with the subjective component, British Columbia has come the closest to adopting the above-mentioned position. However, even there, the position is not entirely satisfactory since the "strike" definition encompasses work stoppages aimed at compelling *another* employer to grant concessions to its employees.

The two leading decisions of the British Columbia Labour Relations Board are *MacMillan, Bloedel Packaging Ltd. and Woodworkers, Locals 5 & 8*[171] and *Canex Placer Ltd.* v. *Industrial Workers, Local 17*.[172] The facts of both cases are similar. The picketing union established its picket line at the plant of a "secondary" employer whose employees refused to cross the line during the currency of their collective agreement. In respect of the picketing union, the picketing was lawful under the relevant provisions of the Code. The "secondary" employer sought a cease and desist order against its own employees on the ground that they had violated section 79 of the Labour Code,[173] which imposes the compulsory in-term "peace obligation". In both cases the board held that there was no "strike" because the employees who honoured the picket line did not do so with the specific purpose of compelling their own or the primary employer to settle a dispute about terms or conditions of employment. The board laid down as a general inference that honouring a picket line does not *per se* establish the requisite subjective element in the definition. Chairman Weiler stated:

> This work stoppage must be the product of some type of mutual or collective decision by the employees, one which is motivated by the desire to compel an

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[170] A cease and desist order or injunction compelling secondary unions to cross the lines may occasionally be well received by them as a convenient means of "getting off the hook" when they do not really want to honour the lines.

[171] *Supra* note 75.

[172] *Supra* note 30.

[173] R.S.B.C. 1979, c. 212.

> employer — not necessarily their employer — to settle a labour dispute. No one has any difficulty in recognizing the typical instance of a strike when it occurs. For example, the Local 8 members at Harmac made the decision to withdraw their labour in order to put some pressure on MacMillan, Bloedel to resolve the impasse in the pulp negotiations. Some time later, they set up picket lines at the box plant which they hoped and expected the Local 5 members would not cross. There is no doubt that the purpose of the picketers, acting in concert, was to place further compulsion on MacMillan, Bloedel. However, one cannot automatically transfer the motivation of the picketers to those who encounter the pickets and react to them. The latter rarely arrive at a collective decision to respect the picket line, inform themselves about the labour dispute, and act for the specific purpose of compelling that employer to a settlement. In the typical case, the individual employee automatically and instinctively refuses to cross the picket line, simply because it is there. As a Judge once put it, union members react to a picket line as though it were an "electric fence". Indeed, the Board has experienced a remarkable number of cases in which a picket line is placed at the entrance to a place of business shared by a number of employers and the employees of none of them will go to work even though their action could not conceivably influence the struck employer to settle the contract dispute.[174]

However, the inference is rebuttable. The board stated that if employees at plant *A* who are not in a legal strike position invite employees at plant *B* who are in such a position to lawfully picket plant *A* so as to force their employer to make concessions, the employees at plant *A* will manifest the requisite motive because they will be using the plant *B* pickets as a "smoke screen" for their own dispute.[175] The board also recognized that there are circumstances when the employees of the picketed plant can be said to have allied themselves to the cause of the picketing union so as to establish the requisite motive: for example, when they take a collective decision to honour the line or perhaps invite the striking union to commence picketing.[176] It seems, however, that such circumstances will be exceptional. The board's decision in both cases was strongly influenced by the policy not to undercut the picketing union's freedom to effectively exercise its right to lawfully picket under the Code. As the board stated:

> These legal conclusions, which flow inexorably from the premise of their Employer's appeal, are incongruous to say the least, not just in terms of the expectations of the B.C. industrial relations community but also in the face of other explicit provisions of the Code itself. Section 85 allows a union to picket not only at the site of the strike but also at secondary locations of the struck employer and of any "ally" it has in the strike. This means that the union is entitled to persuade employees at any one of these secondary locations to refuse to go to work behind the picket line. Now we are told that

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[174] *MacMillan, Bloedel Packaging Ltd.*, *supra* note 75, at 103. Approved in *Canex Placer*, *supra* note 30, at 16,248-49.

[175] *MacMillan, Bloedel Packaging Ltd.*, *supra* note 75, at 95-96; *Canex Placer*, *supra* note 30, at 16,249. The subjective element was held to be satisfied in Texaco Can. Ltd. and Oil Workers, Local 9-601, [1977] 1 W. L.A.C. 177 (Williams, 1976).

[176] *Canex Placer*, *supra* note 30, at 16,249-50; *MacMillan, Bloedel Packaging Ltd.*, *supra* note 75, at 104-05.

> the Legislature, in another part of the Code, has made it illegal for these employees to be persuaded. The law first makes trade union picketing legal if it is directed at certain targets, the struck employer or its ally. But as soon as this picketing is having some success, the employer who is its target can go to the Board and demand an end to this "illegal" activity by its own employees of not crossing that picket line.
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> We are not prepared to impute to the B.C. Legislature such a schizophrenic set of labour law policies. What the Code does is to focus on the activity of picketing itself as the proper subject for regulation. The occasions on which a picket line may be used are carefully defined. . . . Picketing may lawfully be directed only at the struck employer and its allies, not at independent third party employers. Superimposed on this legal framework are broad discretionary powers conferred on the Board by s.85(2) and s.86 to ensure that the impact of picketing does not spread beyond the proper bounds indicated by the policies of the Code. The thrust of the statutory restrictions is directed at the activity of picketing, which is the cause of the work stoppage, rather than the anticipated reaction to the picket line, which is merely the symptom. It would make a mockery of the delicate balance created by the Legislature in its picketing law to hold that once a picket line has surmounted all of these legal obstacles and, as soon as it is having some effect, the employer may come to the Board and ask us to order employees and union members to cross a legal picket line.[177]

The facts of the *MacMillan Bloedel* and *Canex Placer* cases indicate that the board will be extremely reluctant, given that legislative policy, to find the requisite motive. Thus, in *MacMillan Bloedel*, the picketing and picketed employees were members of the same union, albeit in different locals, and the picketing union's officers addressed a meeting of the employees to explain the state of their negotiations and their reasons for picketing. The practice in industry was for the picketed plant to pick up the settlement of the striking union. In *Canex Placer*, the striking union distributed leaflets, handed out by union officials of the picketed employees, encouraging the employees to honour the picket line. In addition, the striking union addressed a meeting of the picketed employees' union to explain its dispute and the reasons for picketing. This evidence strongly suggests in both cases that the employees' purpose was more than treating the picket line as an "electric fence", although a distinguishing feature of *Canex Placer* could be that such picketing was a novel innovation in the industry in question, so that the striking union was justified in explaining thoroughly its position to the picketed employees. In any event, the crucial point is that it is contrived

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[177] *MacMillan, Bloedel Packaging Ltd.*, *supra* note 75, at 104-05. For a critique of the Ontario position, *see* the decision of Mr. Hodges in Hickeson-Langs Supply Co. v. Baker, [1974] Ont. L.R.B.R. 281, at 283, who stated:

> The applicant company would appear to have created its own problem by strike breaking in the past and by attempting to do the same thing again. Unfortunately there is no legislation to deal with such provocative activities. In my opinion, an employer who deliberately runs the risk of disrupting good relationships with employees working under the terms of an existing collective agreement, as is apparent from the evidence in this case, deserves no relief.

The majority granted a declaration of an unlawful "strike" in that case

to say that the requisite motive is not present because the picket line operates as an "electric fence". It may be that "trade union solidarity" is the immediate motive for honouring the line, but "union solidarity", if it means anything, surely involves a common objective of furthering one group's battle against its employer in the expectation of reciprocal support when other groups are on strike. One must ask: "solidarity" for what purpose? The answer is surely to pressure employers into making concessions. Of course, if the reason of one or more employees refusing to cross is a *bona fide* and reasonable belief that they or their families will be physically injured, the requisite purpose is clearly absent. Lastly, the British Columbia Board has not differentiated between lawful and illegal strikes as the basis for determining the legality of honouring picket lines. Thus, honouring *illegal* pickets will not transform the activity into a "strike". It does seem, therefore, that the board is prepared to considerably manipulate the "purpose" component in order to further the underlying policy of the statute. Such manipulation would not have been necessary had the legislation spelled out that honouring lawful picket lines would not constitute a "strike". This could have been achieved by excluding from illegitimate purpose stoppages aimed at compelling *other* employers to grant concessions to their work force. As was suggested earlier,[178] such work stoppages are properly considered within the realm of collective agreement arbitration, not of the statutory peace obligation.

As regards the liability of the union in arbitration under the collective agreement, the British Columbia Labour Relations Board has expressed the view that arbitrators should require an "explicit commitment"[179] in the agreement in order to encompass honouring picket lines within the private "no-strike" clause. Whereas the statute assumes a neutral role in permitting the parties to negotiate voluntarily over the effect of mid-term work stoppages which lack the requisite illegitimate purpose, the presumption of statutory immunity should not be deemed to have been relinquished lightly by the union. As the board explained:

> At the outset of this case, the Union asked this Panel to re-think that *obiter* comment from the *MacMillan, Bloedel Packaging* decision. Counsel suggested that it was inconsistent with the principle of the Code articulated earlier — that the Board should control the picketers rather than the picketed — for the Employer and the Union to contract that employees must cross a legal picket line. However, in our view, there is no legal inconsistency at all. The Code defines the basic legal obligations which are the mandatory minimum in all labour disputes. There is no reason why a particular employer cannot seek even greater protection for its operations against interruption in labour disputes nor is there any bar to any trade-union agreeing to provide that security (perhaps in return for some concessions by the employer in another area).
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> On the other hand, recognition of the distinctive character of a work stoppage produced by an outside picket line should make an arbitrator pause

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[178] *See* p. 526 *supra*.

[179] *Canex Placer*, *supra* note 30, at 16,253. *See also Dominion Bridge*, *supra* note 59, at 304.

> before concluding that that situation is caught by the standard no-strike clause in a collective agreement. The *Labour Code* makes it mandatory that the parties provide for peaceful arbitration without stoppage of work of all disputes in the application of their agreement (see Section 93(2)). The Code also prohibits any strike or lockout by either side to secure its way about the interpretation or the amendment of the collective agreement (see Section 79). Accordingly, when the parties write the usual no-strike/no-lockout clause into their contract, this constitutes a recognition by the parties of their pre-existing statutory obligations (although it also ensures that arbitration will be available as an additional vehicle for relief if the obligation is violated). It is a very different thing for a trade-union to agree that its members will always cross legal picket lines established by another union. That agreement would give an employer a much higher degree of protection than it is entitled to under the Code itself. One would expect that a union would voluntarily commit itself to providing the employer with the security — especially through action that its members might find quite distasteful — only in return for substantial benefits obtained from the employer elsewhere Accordingly, it does seem a fair implication of the principles of the Code that an arbitrator should be thoroughly satisfied, either from the language, the negotiating history, or the actual administration of the agreement, that the union did consciously agree to such a provision before interpreting general contract language to that result.[180]

Nor does the board conclude from the fact that honouring picket lines is generally not a statutory "strike" that individual employees should be implicitly protected against discipline under the collective agreement. Again, this is a matter for joint regulation between the parties and it is for the union to win a clause protecting its members against discipline. As the board stated:

> Whatever be the employees' motivation for their action, from the employer's point of view the employee is absent from work without leave and the cumulative result of all the employees being absent is that its operation has been shut down. The Code does not require the Employer to sit tight and absorb the harm inflicted by a legal picket line. Instead, the Employer is entitled to use its normal management right to discipline its employees in order to discourage the effects of picketing.
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> ....
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> ... [T]he Code does not confer any positive right on the employees to honour a picket line. Employees who choose not to cross the picket line and thus do not report to work expose themselves to disciplinary action from their employer who would like to discourage these forms of work stoppage.[181]

Of the remaining subjective component provinces, the statutory peace obligation has been consistently applied to honouring picket lines in Alberta,[182] and the indications are that the same approach would be taken in Nova Scotia[183] and Manitoba.[184] The "union solidarity — electric fence" argument has not been canvassed in any of the decisions. The boards and courts have either assumed that the requisite illegitimate

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[180] *Canex Placer*, *supra* note 30, at 16,251.
[181] *Id.* at 16,252-53.
[182] *See Alpha Constr. Ltd.*, *supra* note 84.
[183] *Robb Eng'r*, *supra* note 52, at 311.
[184] *Inco Ltd.*, *supra* note 52, at 15,010 (Man. C.A.).

purpose was present or ignored the issue by applying expansively the word "includes" to cover the conduct as a matter of policy. Lamentably, the policy issues outlined earlier have never figured in the decisions.

In the objective component jurisdictions, the recent Supreme Court of Canada decision in the *Longshoremen's* case[185] reaffirms earlier authorities to the effect that no subjective "illegitimate purpose" requirement is to be implied into the statutory definitions so as to prevent the honouring of picket lines from constituting "strikes" on the "union solidarity — electric fence" argument.[186] Unfortunately the Court focused its reasoning on the latter issue and ignored the more substantial issue of whether, as a matter of policy, the statutory peace obligation is designed for that kind of conduct.

In an Ontario Labour Relations Board decision preceding the *Longshoremen's* case, *Nelson Crushed Stone* v. *Cement Workers, Local 494*,[187] the board provided the following rationale for reaching the same conclusion as the Supreme Court:

> The special protected status which counsel claims for the activity of lawful picketing does not exist in the province of Ontario. While it is true that the right of employees engaged in a lawful strike to peacefully picket at the site of the strike has been recognized, there has been no express legal recognition, either in *The Labour Relations Act* or at common law, of the right of employees bound by a collective agreement to honour the picket line of another union, whether legal or illegal. The absence in this province of legislation dealing with the problem of picketing is to be contrasted with the situation which exists in British Columbia where the Legislature has enacted an elaborate statutory framework to deal with picketing and the work stoppages it may produce. A qualification of the strike definition contained in *The Labour Relations Act* so as to permit a concerted refusal by employees to cross a picket line during the term of a collective agreement would not result, therefore, in the Board taking a neutral position as argued by counsel for the respondents. On the contrary, if the Board were to apply the definition of "strike" in the manner suggested, it would be effecting a fundamental change in the balance of collective bargaining power in this province. Such a change, if it is to be effected, should be undertaken by the Legislature and not by the Board.[188]

However, as was pointed out by Professor Beatty, in Ontario it is strongly arguable that by conferring a "right" to strike lawfully, the legislature of that province has implicitly sanctioned the legitimacy of consequences that are not *qualitatively* different from those produced by a successful strike.[189] The common law tort legalities, which regulate the substantive lawfulness of picketing in Ontario, are to be viewed as an aberration from the statutory policy. Thus a refusal to cross picket lines, which are "primary" in the true sense of that word, should not constitute

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[185] *Supra* note 49.

[186] *See* note 79 and accompanying text *supra*.

[187] *Supra* note 63.

[188] *Id.* at 16,837-38.

[189] Beatty, *Secondary Boycotts: A Functional Analysis*, 52 CAN. B. REV. 388, at 390-400 (1974).

a statutory "strike", irrespective of the legality of picketing at common law. Otherwise, the circularity would occur whereby picketing is unlawful in tort because it procures a statutory "strike" and there exists (and should exist) a statutory "strike" only because the picketing is unlawful! The same argument applies to the Canada Labour Code[190] and the Prince Edward Island Labour Act[191] which also confer a "right" to strike and regulate picketing by the common law torts. In addition, in Ontario, the effect of encompassing refusals to cross picket lines within the statutory peace obligation circumvents the policy of section 20 of the Judicature Act,[192] which establishes tough procedural limitations on an employer's right to obtain an injunction restraining illegal picketing. That section is clearly designed to protect the freedom to picket from its most potent enemy, the interlocutory injunction. Yet if the picket line succeeds in the very purpose for which it was established, so that other employees obey it, the primary employer can arrange immediately for the board to order those employees to cross the line. In effect, section 20 is nullified, unless the board has the good sense to refuse its discretion to grant the order. It is therefore submitted that the Ontario Board, in *Nelson Crushed Stone*, is misconceiving the impact on the legitimate balance of bargaining power of applying the statutory peace obligation to the honouring of picket lines.

In objective component provinces which do confer specific statutory rights to picket, namely Newfoundland and New Brunswick, an analogy can be drawn with the approach in British Columbia. Here, there is unquestionably a legislative mandate to picket, albeit of relatively narrow confines,[193] so that honouring such picket lines should at the least not violate the statutory peace obligation. Indeed, the New Brunswick courts have held that where secondary employees in a common *situs* picketing situation honour picket lines in breach of their current collective agreements, such breaches do not furnish unlawful means so as to taint the lawfulness of the picket line under the "without acts that are otherwise unlawful" provision in section 104(1).[194] The policy implicit

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[190] R.S.C. 1970, c. L-1, s. 109, *as amended by* S.C. 1972, c. 18, s. 1.

[191] R.S.P.E.I. 1974, c. L-1, s. 8(1).

[192] R.S.O. 1970, c. 228.

[193] The Labour Relations Act, 1977, S.N. 1977, c. 64, s. 124(1), (2), Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 104(1), (2), incorporating the restrictive "without acts that are otherwise unlawful" formula, unlike the Newfoundland counterpart.

[194] *Compare* Metro Constr. Ltd. v. Paper Workers, Local 610, 13 N.B.R. (2d) 41 (Q.B. 1975) *with* the restrictive approach in Edinburgh Developers Ltd. v. Vanderlaan, [1974] 3 W.W.R. 481, 43 D.L.R. (3d) 354 (Alta. C.A.), *application for leave to appeal denied* [1976] 1 S.C.R. 294, 3 N.R. 533, 52 D.L.R. (3d) 479, interpreting the same formula in s. 134(1) of The Alberta Labour Act, 1973, S.A. 1973, c. 33. In Alberta, the only exception seems to be where a union pickets its place of employment and other employees of the same employer refuse to cross. The latters' refusal to work probably does not furnish unlawful means so as to taint the otherwise lawful picketing. *Id.* at 491-92, 43 D.L.R. (3d) at 376 (Prowse J.A. in his dissenting judgment with the approval on this point of Allen J.A.).

in this view is inconsistent with the notion that honouring the lines is intended to be a "strike" within the legislative scheme.

In *Nelson Crushed Stone*, the Ontario Board also rationalized its conclusion by suggesting that the philosophy of the statutory peace obligation is to guarantee employers *total* protection against collective interference with operations during the collective agreement. The board stated:

> *The Labour Relations Act* treats any collective work stoppage as being, in essence, an economic weapon and restricts its use to a certain collective bargaining situation — the final stages of the negotiation and renewal of a collective agreement. To avoid disruption in production and to promote industrial relations harmony, all work stoppages occuring outside this limited period, whatever their underlying motive, are prohibited.[195]

This cannot be correct. For instance, refusal to cross picket lines or to perform work out of an honest and reasonable fear for personal safety has not been considered a "strike", and the fact that the employees concerned make the decision in concert should make no difference. The crucial point, as was suggested earlier, is that the statutory peace obligation is not intended to deal with *any* kind of work stoppage, merely those having as their purpose the illegitimate infliction of mid-term bargaining pressure. The remainder are envisaged as falling within the domain of private regulation, administered through the grievance and arbitration procedures in the collective agreement.

One consequence of the approach in *Nelson Crushed Stone* and the *Longshoremen's* case[196] is that clauses in collective agreements giving the right to honour picket lines are held void, insofar as they relate to the statutory peace obligation, because "the parties are not competent to enact private legislation which would take them beyond the provisions of [the Act]".[197] Even where the clause is capable of being construed, on its face, as a promise by the employer to relinquish its right to assign work in the circumstances of a picket line, it is nonetheless held to be invalid.[198] It is somewhat bizarre to say that a clause which results in no

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[195] *Supra* note 63, at 16,843. *See also* the cases cited in note 79 *supra*.

[196] *Supra* note 49.

[197] Flintkote Co. v. Teamsters, Local 879, [1976] Ont. L.R.B. 291, at 293. Other authorities to the same effect are reviewed in *Nelson Crushed Stone*, *supra* note 63, at 16,841-44.

[198] This would be an arguable construction of the clause in *Flintkote Co.*, *supra* note 197, at 292. In *Nelson Crushed Stone*, *supra* note 63, at 16,843, the board appeared to reject the argument that the employer could relinquish its right to schedule work by such a clause, because it would offend the "strike" ban. *But see* the opposing view of Prowse J.A. (dissenting) in *Edinburgh Developers Ltd.*, *supra* note 194, at 496, 43 D.L.R. (3d) at 380. *See also Re* Photo-Engravers', Local 35-P and Toronto Star Ltd., 22 L.A.C. 319, at 322 (Weatherill, 1971), *aff'd* [1972] 1 O.R. 369, 23 D.L.R. (3d) 153 (H.C.). In C.P.R. v. Truck Drivers, Local 213, [1971] 5 W.W.R. 1, at 45 (B.C.S.C.), *aff'd* 77 C.L.L.C. 14,537, 60 D.L.R. (3d) 249 (B.C.C.A. 1975), Verchere J. suggested that the application of a non-affiliation clause would not violate the statutory strike ban. The majority of the Court of Appeal held that there would be a "strike" because the clause did not cover the refusal, perhaps thereby intimating that there would be no "strike" if it did.

work being scheduled is void because it offends a statutory provision which depends on work being scheduled in the first place! If the employer were to voluntarily close down operations to enable the work force to watch the Olympic games, it should hardly be allowed to subsequently cry "strike" and have the board force them back to work. Indeed, in *Freelance Erectors Ltd.* v. *Doyle*,[199] the Ontario Board refused to find a "strike" because no evidence was adduced that work was scheduled for the eight day period during which the pickets were present. It is submitted, for the reasons given earlier, that the consequence of *Nelson Crushed Stone* and the *Longshoremen's* case is inconsistent with the scheme of the legislation as properly understood and is unfair to the union.

In the objective component provinces, it seems that collective agreement clauses giving the right to honour picket lines are relevant in three respects. First, they may be grounds for the boards and courts refusing discretionary relief to compel employees to cross the lines. Secondly, they are evidence of individual, as opposed to concerted, decision-making on the part of employees who exercise their "right". However, they are not conclusive evidence. Such a clause will not relieve the union, for example, where the facts disclose that one or more of its members or officers formed the picket line so as to suggest an "orchestrated" refusal to cross. This is also the case where the employees decide in a mass meeting to honour the line, following instructions or recommendations of their union officers to that effect. In *Nelson Crushed Stone* itself, a membership meeting did closely precede the refusal to cross the picket line, but at that meeting the union officers firmly informed the employees that their decision to exercise their "right" was purely a matter for their individual consciences. This was not a case where the officers "gave the wink" to suggest the opposite of their recommendations. Whereas such articles are ineffective as regards permitting the parties to contract out of the statutory "strike" ban, *Nelson Crushed Stone* shows that they are important evidence in the initial determination of whether a "strike" exists. Since no such clause was present in the *Longshoremen's* case, it would presumably still be open to argue that such a clause may be evidence of individual decision-making.

Thirdly, there is authority that such clauses will protect the union against a damages action in arbitration for breach of the collective agreement[200] and also protect individual participants against disciplinary sanctions.[201] Insofar as the no "strike" obligation is compulsorily

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[199] [1972] Ont. L.R.B.R. 818.

[200] Labourers, Local 506 v. Pigott Constr. Co., [1968-69] Ont. L.R.B.R. 1332 (1969); Associated Freezers Ltd. v. Warehousemen, Local 419, [1972] Ont. L.R.B.R. 445, at 449.

[201] Regina v. Fuller, *Ex parte* Earles, [1967] 1 O.R. 701, at 705, 62 D.L.R. (2d) 156, at 160 (H.C.), *aff'd* [1968] 2 O.R. 564, 70 D.L.R. (2d) 108 (C.A.); Telecommunications Workers and British Columbia Tel. Co., [1979] 2 Can. L.R.B.R.

imposed into the collective agreement by the statute, then such clauses would appear to offend directly the statutory provisions and should not provide a defence to the union in arbitration. It should not logically make any difference to the enforceability of the clause that one or other remedial forum is selected by the employer, so long as the no "strike" obligation *derives* from the legislation.[202] It may make for sound policy that the employer should not be allowed to recoup in arbitration what it has previously given up in bargaining, as was suggested earlier, but it is difficult to find a satisfactory legal basis for such a position. Similarly, if discipline is imposed on the basis of each individual's *personal* breach of the no "strike" obligation, injected into the agreement by the statute,[203] then logically the clause should not provide an individual defence. The clause is unenforceable insofar as it purports to contract out of obligations compulsorily imposed by the statute, whether those obligations fall on the union or the employees. Presumably, this would not prevent an arbitrator from having regard to the clause as a mitigating factor in his determination of the quantum of penalty in a discipline grievance.[204] Alternatively, it might be argued that the employer's ground for discipline is breach of the personal obligation to work under the collective agreement, in which case the clause could provide a defence because that obligation is not imposed directly by the statute. This distinction as to the ground of discipline is somewhat hair-splitting.[205] It results, in a sense, in the forms of pleading dictating the employee's fate. If the employer disciplines on the record for "failure to work", the employee is safe. If the record reads "participation in an illegal strike", the employee is not safe.

In summary, the present statutory peace obligations in all jurisdictions are too widely drawn insofar as they relate to honouring picket lines. In the objective component jurisdictions, such conduct will almost always constitute a statutory "strike", subject only to the presence, as evidence of individual decision-making, of collective agreement articles which confer the right to honour. The position is unsound in terms of the legislative sanctioning of the striking union's freedom to picket effectively and of collective freedom of contract. It also misconstrues the

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297, at 307 (Can. L.R.B.); *Nelson Crushed Stone*, *supra* note 63, at 16,844; *McCormick's Ltd.*, *supra* note 64, at 337-38; *Re* Toronto Newspaper Guild, Local 87 and The Telegram, 12 L.A.C. 165, at 168-69 (Hanrahan, 1961); *Re* Typographical Union, Local 91, and Council of Printing Indus., 15 L.A.C. 318 (Reville, 1964).

[202] It was held that such clauses would be void for all purposes in Otis Elevator Co. v. Elevator Constructors, Local 125, 5 N.S.R. (2d) 437, at 449, 36 D.L.R. (3d) 402, at 410 (C.A. 1973) (Cooper J.A.), *rev'g in part* 22 D.L.R. (3d) 709 (S.C. 1972).

[203] *See*, *e.g.*, The Labour Relations Act, R.S.O. 1970, c. 232, s. 36(1).

[204] *E.g.*, The Labour Relations Act, R.S.O. 1970, c. 232, s. 37(8) reads "just and reasonable in *all* the circumstances" (emphasis added).

[205] However, it apparently underlies the Supreme Court of Canada decision in *Winnipeg Teachers*, *supra* note 33, where vicarious liability was imposed on the union for procuring breach of individual obligations under the agreement rather than for procuring an illegal "strike" in violation of the statute.

true nature of the statutory peace obligation, which is not to impose a blanket denial of every work stoppage during the lifetime of the collective agreement. The position is tempered somewhat by the possible denial of discretionary relief and by the possibility of "right to honour" clauses affording protection to the union and employees in arbitration. In other provinces, the subjective component is sufficiently flexible to avoid that unfortunate position, but only at the expense of convoluting it beyond its common sense meaning. Only British Columbia has unequivocally followed that route, and the indications are that Alberta, Nova Scotia and Manitoba will not. The reason is, perhaps, that British Columbia is the first province to regulate picketing through a statutory code based on meaningful considerations of ally, quarantine, and relative bargaining strengths. In view of that legislative policy, it was inevitable so as to avoid legislative schizophrenia that honouring lawful picket lines should not constitute a statutory "strike". Elsewhere, the issue has been buried because of the unsophisticated approach to regulating picketing.

4. *Job Action Pursuant to Sub-Contractor, Non-Affiliation and "Hot Cargo" Clauses in the Collective Agreement*

A typical sub-contractor clause requires the employer to extend the terms of the agreement to all jobs which the employer lets out on a subcontract basis and requires the employer to utilize only those sub-contractor firms whose employees are members of the signatory union in regard to work falling within the latter's jurisdiction. In effect, the employer guarantees the extension of the collection agreement, including the compulsory union membership requirement, to the union's jurisdiction on the job site. The union's interest in such clauses is obvious. They maximize employment opportunities for union members and preserve work jurisdiction to the extent that sub-contractors cannot hire cheaper, non-union labour. If the union operates a hiring hall, the employment opportunities can be distributed fairly by the union among its members rather than be at the whim of the employers. This is especially important in the construction industry where the cyclical and erratic pattern of operations results in a highly mobile and transient work force. Moreover, by extending the terms of the collective agreement to sub-contractors, the union seeks to minimize the potential dilution of its "craft" skills. Not unexpectedly, the sub-contractor clause is universal in the construction industry. In isolation, the sub-contractor clause is not an effective protection for the union because technically the sub-contractor is not bound by the collective agreement to the union. It is true that insofar as the employer guarantees extension of the agreement, the union can in arbitration[206] recover damages for the lost opportunities of its members. However, the union has no on-the-job policing rights

[206] *Re* Blouin Drywall Contractors Ltd. and Carpenters, Local 2486, 8 O.R. (2d) 103, 57 D.L.R. (3d) 199 (C.A. 1975).

against the sub-contractor. It is partly for this reason that sub-contractor clauses are normally complemented by non-affiliation clauses.

A typical non-affiliation clause states that the employees are entitled to refuse to work alongside non-union labour or union labour where the union in question is not affiliated to a certain labour organization. They usually provide that refusal to work in such circumstances shall not be deemed a breach of the collective agreement. Apart from reinforcing the union's private interests under the sub-contractor clause, such provisions seek to maximize the collective interests of all affiliated unions by ensuring that all jobs are total "union jobs" to the advantage of all the affiliates. Again, such clauses are prevalent in the construction industry.

A typical "hot cargo" or "unfair goods" clause provides that the employees are entitled to refuse to work on goods that have been deemed to be "hot" or "unfair" by another labour organization and that such refusal shall not constitute breach of the agreement or grounds for discipline. Often the clause simply provides that the employees will not be required to work on goods which emanate from a secondary employer involved in a lawful strike/lockout with its employees. Such clauses cater to the union's philosophical interest in protecting "trade union solidarity" and the more practical consequence of reciprocation when it is in dispute with its own employer. Their purpose is to extend the impact of the lawful strike beyond the primary *situs*. For that reason, they are distinguishable from sub-contractor and non-affiliation clauses and must be considered in the context of the primary union's right to utilize its economic strength against the employer in the economic battle.

It is now established that sub-contractor and non-affiliation clauses are not *intrinsically* void by reason of being in restraint of trade, or otherwise repugnant to public policy as this is manifested in the scheme of the labour relations legislation.[207] In particular, they are not necessarily inconsistent with the statutory "no-strike" ban since the union and the contractor can agree to the clauses before any employees

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[207] C.P.R. v. Truck Drivers, Local 213, *supra* note 198, at 14,546-47, 60 D.L.R. (3d) at 268-70 (C.A.); Ironworkers Union No. 1 v. Ironworkers, Local 97, 73 W.W.R. 172, at 174, 200; 13 D.L.R. (3d) 559, at 560, 585 (B.C.C.A. 1970), *aff'd* [1972] S.C.R. 295, [1972] 1 W.W.R. 518, 21 D.L.R. (3d) 469 (1971). Note that Pigeon J. implicitly accepted the legality of the sub-contractor clause but did not appear to mention the non-affiliation clause. *Id.* at 300, [1972] 1 W.W.R. at 521, 21 D.L.R. (3d) at 473. Note also that Nemetz J., in the Court of Appeal, left open the question of whether a sub-contractor clause would be lawful if it were being utilized for an illegitimate purpose. *Id.* at 202. 13 D.L.R. (3d) at 587. What if the clause is being *generally* utilized to force indirectly secondary employers to recognize the union for its employees, when they are outside the union's work jurisdiction and perhaps do not want any collective bargaining? *See* R. M. Hardy & Assoc. Ltd. and Teamsters, Local Union 213, [1977] 2 Can. L.R.B.R. 357, at 377, 379-83 (B.C.L.R.B.). The general legality of such clauses has been accepted recently in Ontario: *see* Bricklayers, Local 1, and Metropolitan Toronto Apartment Builders Ass'n [1979] 1 Can. L.R.B.R. 197, at 207-08 (Ont. L.R.B. 1978).

are actually hired and work begins. There is obviously no "strike" in that event.[208]

The position of "hot cargo" clauses is less certain. In *C.P.R. v. Truck Drivers, Local 213*,[209] Bull J.A. suggested that such a clause may be invalid as going beyond the "legitimate abstention of work and selection of workmates, and . . . out unduly into the boycott field. . . . [I]ts content could well be beyond the boundaries of legitimate service to the interests of organized labour."[210] However, His Lordship did not make a ruling on the point, due to the paucity of argument by counsel and the fact that, in the circumstances of the case, the plaintiff had not suffered injury by the "hot cargo" clause. Seaton J.A., in a dissenting judgement, considered that the "hot cargo" clause was lawful *per se*, at least in the construction industry, because "[o]nly co-operation will safeguard the unions and their members. To do something for the purpose of helping another union with the ultimate object of helping oneself, in my view, is not unlawful."[211] His Lordship was prepared to view the expectancy of reciprocal assistance as sufficient self-interest to outweigh the short term escalation of the primary dispute and the possibility of illegitimate secondary activity. His Lordship reached this decision by analogizing with the classic tort authorities which establish that economic self-interest is "legitimate" for the purpose of avoiding liability in "simple" conspiracy.[212] The earlier British Columbia court decisions did not involve "hot cargo" clauses and so cannot stand as decisive of their intrinsic legality. The ruling of the Ontario Labour Relations Board that sub-contractor and non-affiliation clauses are inherently lawful also did not consider "hot cargo" clauses.[213]

On the other hand, the British Columbia Labour Relations Board in *Construction Labour Relations Ass'n. and Electrical Workers, Local 213*,[214] held that "hot cargo" clauses are not unlawful *per se*, and this was also implicit in a recent Ontario grievance arbitration[215] as well as a recent decision of the Canada Labour Relations Board.[216] It is submitted that this is the preferable view. The "hot cargo" declaration serves the

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[208] *E.g., Hardy Ltd., supra* note 207, at 374 and the authorities cited therein. Further, to the extent that they protect the employees against personal discipline and the union against damages in arbitration, they are valid even though there may be an illegal strike. *See* pp. 573-74 *infra*.

[209] *Supra* note 198.

[210] *Supra* note 198, at 14,547, 60 D.L.R. (3d) at 270.

[211] *Id.* at 14,560, 60 D.L.R. (3d) at 293.

[212] His Lordship cited Mogul S.S. Co. v. McGregor, Gow & Co., [1892] A.C. 25, 66 L.T. 1 (1891); Crofter Hand Woven Harris Tweed Co. v. Veitch, [1942] A.C. 435, [1942] 1 All E.R. 142 (1941); Newell v. Barker, [1950] S.C.R. 385, at 397-99, [1950] 2 D.L.R. 289, at 299-301 (Rand J.).

[213] *See Bricklayers, Local 1, supra* note 207.

[214] (Unreported, B.C.L.R.B., 18 Jan. 1978) (letter decision).

[215] *See Toronto Star Ltd., supra* note 198. "Hot cargo" clauses may also serve the purpose of insulating employees from discipline and the union from damages in arbitration. *See* the cases cited in notes 200-01 *supra*.

[216] *See Telecommunications Workers, supra* note 201, at 307

same purpose as a picket line for the primary union. Just as "right to honour" picket line clauses may be valid for certain purposes, so too should "hot cargo" clauses in the collective agreements of secondary parties. Indeed, if the employer chooses not to order employees to perform the strike work because of the clause, there would surely not be a "strike", because the employees would not be enforcing the clause. A blanket illegality for such clauses is too inflexible to take account of particular situations where their application is compatible with the provisions and scheme of the labour legislation.

Work stoppages pursuant to non-affiliation and "hot cargo" clauses involve potential violation of the general statutory peace obligation. Also, in Nova Scotia, Alberta, Manitoba and the federal jurisdiction, the legislation contains specific regulation of non-affiliation and "hot cargo" clauses.[217] Lastly, to the extent that such clauses are lawful as between a union and its employer and yet the union may nonetheless face liability in tort to third persons who suffer economic injury from their application, the efficacy of the clauses is obviously undermined.[218]

(a) *The General Statutory Peace Obligation*

It is submitted that work stoppages pursuant to non-affiliation clauses should not constitute a statutory "strike". They are not designed to inflict in-term bargaining pressure on employers, but indeed they fall squarely within the domain of arbitration. To hold otherwise is to abrogate collective freedom of contract when there is no clear legislative mandate in favour of such an abrogation. Of course, the position should be different if the clause is being utilized to cover up a dispute of interest, or if the union is attempting to force its interpretation of an ambiguous clause on the employer. The only exception should be in Ontario,[219] New Brunswick,[220] Nova Scotia,[221] Prince Edward Island[222] and Alberta[223] in the case of construction industry jurisdictional disputes. In these provinces, the legislative scheme envisages that jurisdictional disputes will be resolved without any interruption of operations, so that non-affiliation stoppages which fall within the ambit of "jurisdictional disputes" should be prohibited. Indeed, it is significant that in Nova Scotia, which has the subjective component in the general "strike" definition, "work stoppages" are outlawed in respect of jurisdictional disputes,[224] and they are defined in exclusively objective terms.[225]

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[217] Described at pp. 584-89 *infra*.

[218] *See, e.g.*, C.P.R. v. Truck Drivers, *supra* note 198.

[219] The Labour Relations Act, R.S.O. 1970, c. 232, s. 81.

[220] Industrial Relations Act, R.S.N.B. 1973, c. I-4, ss. 83-88.

[221] Trade Union Act, S.N.S. 1972, c. 19, ss. 48, 50.

[222] Prince Edward Island Labour Act, R.S.P.E.I. 1974, c. L-1, s. 37.

[223] The Alberta Labour Act, 1973, S.A. 1973, c. 33, div. 14, *as amended by* S.A. 1977, c. 77, s. 14.

[224] Trade Union Act, S.N.S. 1972, c. 19, s. 48(2).

[225] S. 48(1)(*b*).

It is submitted that stoppages pursuant to "hot cargo" clauses should not constitute a statutory "strike" for the same reasons as outlined above. In addition, insofar as "hot cargo" declarations serve the same purpose as a picket line for a lawfully striking union, these clauses in collective agreements should be treated in the same manner as "right to honour" picket lines clauses and should not, for the reasons given earlier,[226] constitute "strikes" when enforced.

In the objective component provinces, work stoppages pursuant to such clauses are within the definitions of "strike" on a literal construction, and the clause itself affords no defence since it "flies squarely in the teeth" of the statutory ban and "cannot make lawful that which the statue [*sic*] states so clearly is unlawful".[227] At best, the presence of the clause may be grounds for the denial of discretionary relief and consent to prosecute, and may be evidence of individual decision-making.

In contrast with this literal construction approach, at least one arbitrator has intimated that the application of non-affiliation and "hot cargo" clauses does not necessarily constitute a "strike". In *Toronto Star Ltd.*,[228] Mr. Weatherhill suggested that if the refusal to work had fallen squarely within the ambit of the "hot cargo" clause (which it did not), then that clause might have provided a "shelter" against a finding of "strike". Unfortunately the arbitrator did not elaborate his reasons for this conclusion. In *C.P.R. v. Truck Drivers, Local 213*[229] Verchere J., at first instance, rejected the argument that the application of the non-affiliation and "hot cargo" clauses would violate section 5(2) of the old British Columbia Labour Relations Act[230] so as to furnish "unlawful means" for the purpose of a third party tort action against the union. The section provided that no trade union or employee "shall support, encourage, condone or engage in any activity that is intended to or does restrict or limit production or services". His Lordship, in very vague terms, concluded:

> [I]t seems to me apparent . . . that s.5(2) . . . lacks relevance to the matters of concern here; it has been called the "slow-down clause" and I think it probable that it is against that type of conduct that it is directed and not the conduct complained of here; and in any event there was no evidence of any intended or actual restricting or limiting of production or services here.[231]

However, in the Court of Appeal[232] the majority held that, as a matter of construction, the clauses did not cover the circumstances of the work refusal, so that there would be a "strike" under the legislation and individual and union breaches of the collective agreement. The

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[226] *See* pp. 563-65 *supra*.
[227] Pigott Constr. Co. v. Zakota, [1969-70] Ont. L.R.B.R. 399, at 403 (1969).
[228] *Supra* note 198, at 321-22.
[229] *Supra* note 198.
[230] R.S.B.C. 1960, c. 205.
[231] *Supra* note 198, at 45.
[232] *Supra* note 198.

implication is that there would be no "strike" or breaches of the agreement if the clauses had covered the work refusal, but again no reasons were given by the court.

One possible explanation for these decisions is to construe words like "output" to mean output that would flow from the issuance of lawful orders by management, with "lawful" meaning, in this context, orders that the employee is entitled to disobey without having to first exhaust the grievance and arbitration procedures.[233] Thus, so long as the clause covers the circumstances of the refusal to work and there is no real dispute between the parties as to its meaning, so that instant disobedience would be justified, there is no "strike". In *Pigott Construction*,[234] there was in fact a serious question of interpretation in the clause, which would reconcile the case with this approach. Similarly, in *Kelly, Douglas & Co. v. Bakery Workers, Local 468*,[235] the court spent considerable time construing the clause before concluding that it did not apply. This would not have been necessary had the application of the clause been unenforceable as constituting a "strike". This view assumes that "output", rather than having its literal meaning, must have a special statutory meaning to which the "mischief" principle applies.[236] However, these decisions are exceptional and the weight of authorities is to hold that the stoppages are "strikes".

Although such clauses are invalid insofar as they purport to restrict remedies which the boards and courts might award, due to breach of the legislation, it has been intimated that they may afford a defence to the union in an arbitration damages action for breach of the collective agreement and may also insulate individual employees from discipline.[237] The merit of this conclusion in terms of policy has been applauded earlier, although there are legal difficulties involved with it.[238] At least it goes some way towards tempering the rigours of the statutory peace obligation in the objective component jurisdictions.

In contrast, the subjective element of the "strike" definition in provinces with that component permits a more flexible and realistic treatment of non-affiliation and "hot cargo" clauses. The application of

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[233] *See* note 110 *supra*.

[234] *Supra* note 200.

[235] 65 C.L.L.C. 223, 48 D.L.R. (2d) 520 (B.C.S.C. Chambers 1964).

[236] Some of the earlier Ontario Board decisions did construe the "strike" definition in a purposive manner and subjective purpose was accorded relevance. Thus, in a case involving a question of whether an overtime ban constituted a "strike", the board stated:

> To further the policy of the legislation, then, concerted action by one of the parties . . . which has for its sole purpose the compelling or inducing of the other party to the negotiations to make concessions or to abandon privileges which it presently enjoys should, unless a contrary intention is indicated in the Act, be treated as falling within the mischief for which the legislation was designed to provide a cure.

Harding Carpets, *supra* note 124, at 1566-67.

[237] *See* pp. 573-74 *supra*.

[238] *Id.*

non-affiliation clauses first came before the British Columbia Labour Relations Board in *R.M. Hardy & Associates Ltd. and Teamsters, Local 213*.[239] Hardy Ltd. operated a concrete testing business in the construction industry. Its employees were not unionized, unlike those of its major competitors who were represented by the Teamsters. The Teamsters Local had attempted on several occasions to organize Hardy employees without success. A clause common to Teamster collective agreements in the construction industry gave employees the right to refuse to work on the job site if non-union labour were present. On each occasion that Hardy employees appeared on a site, a Teamsters official would threaten the general contractor with a walkout pursuant to the clause unless unionized concrete testers were hired. Invariably the general contractors complied and, as a result, Hardy was excluded from all union projects in the province. Eventually the Hardy employees did acquire certification with the Teamsters, but the company appealed to the board for a general interpretation of the law relating to non-affiliation clauses. The board stated, first, that the in-term enforcement of non-affiliation clauses does not offend the "strike" ban because the union's purpose is to assert existing rights under the agreement, not to pressure the employer into conceding new rights:

> Their refusal . . . [to work] . . . is permitted by the terms of their collective agreement [with their employer] (and their employer does not dispute that fact). The employees stop working not because they want to secure any gains under their agreement with their employer. Indeed, in the typical case, the union is not really concerned to secure anything from the non-union employer — either a signature to a collective agreement or membership applications from the non-union workmen. What the union wants to do is to ensure that whatever contractor obtains the job will . . . perform the work in accordance with the standard collective agreement. The union objective then is to see that the scarce work on major construction projects in this Province is distributed among union members, many of whom may be under-employed [240]

The board emphasized that this would only be the case so long as there was no dispute between the parties as to the interpretation of the clause. Otherwise the union's purpose, being to force its interpretation of a condition of employment on its employer, would be illegitimate. Secondly, the board stated that there would be a "strike" if the union's real motive was to use the non-affiliation clause as a smoke-screen to compel Hardy to sign a recognition agreement with its employees.[241] The requisite purpose would clearly be present in that situation. On the facts of the case, the board was not prepared to impute such a motive to the Teamsters.

The board's refusal to nullify non-affiliation clauses as illegal "strikes" was prompted by the policy of maintaining the integrity of section 90 of the Code,[242] just as their refusal to nullify the freedom to

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[239] *Supra* note 207.
[240] *Id.* at 375.
[241] *Id.* at 377.
[242] *Id.*

honour picket lines was prompted by the Code's picketing provisions. In both cases, the application of such clauses has the *forseeable*, albeit indirectly, result of pressuring employers into making employment concessions, but the board did not consider that this would satisfy the purpose requirement. Section 90 read as follows:

> 90(1) Where, upon the complaint of any interested person, the board is satisfied that a declaration by or on behalf of a trade-union or employer, or an agreement or combination between one or more employers and one or more trade-unions, or between 2 or more trade-unions, is substantially affecting trade and commerce in relation to a commodity or service or is substantially affecting the business, operations, or purposes of the complainant, the board may, in its discretion, issue a declaratory opinion that
> (a) the declaration, agreement, or combination is void for all purposes, or
> (b) the declaration, agreement, or combination is unenforceable in specified circumstances or for a specified period of time, or
> (c) the declaration, agreement, or combination is valid and enforceable
> and, where the board issues a declaratory opinion pursuant to paragraph (a) or (b), it may make such orders, or take such steps, as it considered advisable to ensure that persons affected by the declaration, agreement, or combination are informed that it is void for all purposes, or is unenforceable in specified circumstances or for a specified period of time, as the case may be.
> (2) The board, in determining whether to issue a declaratory opinion under subsection (1), shall take into consideration
> (a) the extent to which the employment, business, operations, purposes, or property of the person making the complaint has been affected by the declaration, agreement, or combination, and
> (b) the intent and purpose of this Part and the necessity for reasonable protection and advancement of a trade-union or employer.[243]

Sub-contractor and non-affiliation clauses are clearly encompassed by the section (which is substantially the same in the current Revised Statutes of British Columbia[244]) and are intended to be regulated by the board in furtherance of the underlying policies of the legislation and the competing interests of the parties. Applying the section in *Hardy & Associates*,[245] the board considered that such clauses are legitimate in the construction industry provided that the union does not abuse them as a "top down" organizational tool or as a weapon to win jurisdictional disputes against other unions within or outside the industry. In the latter eventualities, the board stated that the application of the clauses would be declared void.

In respect of the application of "hot cargo" clauses in collective agreements, the British Columbia Labour Relations Board has not yet decided whether this would constitute a "strike".[246] The board would likely follow its usual practice of not finding a "strike" where the

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[243] Labour Code of British Columbia Act, S.B.C. 1973 (2d sess.), c. 122, *replaced by* S.B.C. 1976, c. 26, s. 7.

[244] Labour Code, R.S.B.C. 1979, c. 212.

[245] *Supra* note 207.

[246] In *Construction Lab. Rel. Ass'n*, *supra* note 214, at 5, the board intimated, without deciding, that there would not be an automatic finding of "strike".

employees' purpose is to exercise existing *unambiguous* rights in the agreement, even though a consequential and foreseeable effect may be to exert pressure on an employer for bargaining purposes.[247] So far, the board has regulated the "hot cargo" declaration under section 90 as if it were a form of picketing. Thus, in *Construction Labour Relations Ass'n*,[248] the board declared unenforceable a declaration insofar as it injured neutral employers who would not be legitimate targets of the lawfully striking union's pickets under the Code's picketing provisions. Nor has the board decided the status of a refusal to perform assignments pursuant to a "hot cargo" declaration where there is *no* clause in the agreement expressly conferring such a right. This situation is analogous to a concerted honouring of picket lines which the board has held not to satisfy the requisite purpose.[249] It is possible that the board would impute the "electric fence/solidarity" motive to the "hot cargo" declaration too. It was suggested earlier that the "solidarity" justification is tenuous — "solidarity" for what? — but nonetheless justifiable in terms of the legislative policy of upholding the right to picket. Given that the board regulates the declaration itself as another form of picketing under section 90, it is unlikely that the board would undermine its section 90 discretion by a blanket "strike" finding in regard to compliance with the declaration.[250]

In the remaining subjective component provinces, the British Columbia approach has not as yet been followed. It would not, of course, be possible in Alberta, due to specific statutory prohibition of all non-affiliation and most "hot cargo" stoppages,[251] nor in Nova Scotia in respect of "work stoppages" in the construction industry.[252]

(b) *Specific Statutory Regulation of Non-Affiliation and "Hot Cargo" Stoppages*

(i) *Alberta*

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[247] Of course, the union would not have a right to picket, not being in a lawful "strike" position. *See* Cominco Ltd. and Allied Hydro Council (unreported, B.C.L.R.B., 29 Dec. 1978) (file no. 75/79), at 13.

[248] *Supra* note 214.

[249] *See* pp. 565-68 *supra*.

[250] This is hinted at:

> There would be little point to [s. 90] if every work stoppage resulting from a hot edict were prohibited by the Board as an unlawful strike. The policy of the Code is to attempt a resolution of work stoppages stemming from hot edicts by initially addressing the hot edict itself. Therefore, at this stage we are not making any finding as to whether the work stoppages constitute an unlawful strike under the Code.

Supra note 214, at 5.

[251] This is the effect of The Alberta Labour Act, 1973, S.A. 1973, c. 33, ss. 156 and 155(*k*), discussed at pp. 584-85 *infra*.

[252] Trade Union Act, S.N.S. 1972, c. 19, s. 48.

The Alberta Labour Act, 1973[253] specifically outlaws interruptions pursuant to non-affiliation clauses. Section 156(*a*) states that no employee shall "refuse to perform work for his employer for the reason that other work was or will be performed or was not or will not be performed by any person or class of persons who were or are not members of a trade union or a particular trade union". Section 155(*k*) reinforces that obligation by making it an unfair labour practice for a trade union, or person acting on behalf thereof, to "authorize, encourage or consent" to any such refusal to work by an employee in respect of who it is bargaining agent. These provisions, although of application to industry generally, are especially supportive of the arbitral role of the provincial Impartial Jurisdictional Disputes Board in construction sector work assignment disputes.[254] Their effect is to render nugatory non-affiliation clauses at their moment of enforcement by work refusal. Thus the sections do not make such clauses invalid *per se*.

"Hot cargo" stoppages are covered by section 156(*b*) which provides that no employee shall "refuse to take delivery of goods from a carrier or refuse to assist in the loading of a carrier of goods for shipment except where the carrier and his employees are engaged in a strike or lockout permitted by this Part". The purpose of the subsection is somewhat obscure on its face. It is clearly intended to confer a right on extraneous employees to refuse to touch goods in the possession of a carrier which is in lawful conflict with its employees, although it is odd that the right should be granted in such a negative fashion. It should be noted that the carrier must be in a lawful strike/lockout position under the Alberta Labour Act, 1973, so that workers in Alberta could not refuse to handle goods in transit with out-of-province struck carriers which are subject to other provincial or federal legislation. It is doubtful that the negative format of the section is intended to infer that refusal to handle struck goods *outside* the parameters of the section is deemed lawful. That would be too sweeping a conclusion and would surely require more emphatic words. Rather it is suggested that the subsection is no more than a "for the avoidance of doubt" provision,[255] designed to emphasize that the "hot cargo" boycott is outlawed at the point of its greatest potency, namely the transmission of goods. The subsection was introduced into the Act before the Board of Industrial Relations had jurisdiction to issue declarations and cease and desist orders in unlawful strikes. The intent was to enable this particularly damaging application of the "hot cargo" boycott to be brought before the board quickly under the board's general cease and desist powers in respect of the unfair labour practices. The subsection was not removed after the board acquired

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[253] S.A. 1973, c. 33.

[254] Div. 14, *as amended by* S.A. 1977, c. 77, s. 14.

[255] The legislative scheme outlaws "hot cargo" edicts at source under s. 134 (except where they are issued by a lawfully striking/locked out union at its members' place of employment to employees of the common employer). It would be surprising if

jurisdiction in unlawful strikes and so cannot, it is submitted, be viewed as inferring that "hot cargo" boycotts are lawful outside the parameters of the subsection. Such boycotts are treated as "strikes" under the Act, irrespective of an express "hot cargo" clause in the collective agreement. Although section 153(3)(*g*) of the Alberta Labour Act, 1973 makes it an unfair labour practice for an employer to penalize an employee who refuses to perform "all or some of the duties and responsibilities of another employee" who is participating in a lawful strike under the Act, this only applies to employees of the same employer in Alberta and arguably does not prevent a *concerted* exercise of the right from constituting a "strike". That section therefore cannot be read as conferring a general power to observe "hot cargo" declarations.[256]

(ii) *Manitoba, Alberta, Nova Scotia and the Federal Jurisdiction*

In these jurisdictions, the legislation confers a limited right to refuse to handle "hot" goods, irrespective of collective agreement provisions. Section 12(1) of the Manitoba Labour Relations Act provides:

> An employee who is in a unit of employees of an employer in respect of which there is a collective agreement in force and who refuses to perform work which would directly facilitate the operation or business of another employer whose employees within Canada are locked out or on a legal strike is not by reason of that refusal in breach of the collective agreement or of any term or condition of his employment and is not, by reason of that refusal, subject to any disciplinary action by the employer or the bargaining agent that is a party to the collective agreement.[257]

This creates a limited right to observe a "hot cargo" declaration, but only where performance of the work would "directly facilitate the operation or business" of the struck employer, and only where the latter is subject to Canadian labour relations legislation. Thus "hot cargo" declarations emanating from international unions on lawful strike in the U.S.A. would not be covered by the section.

The "directly facilitate" requirement was considered by the Manitoba Labour Board in *Seagrams Co. of Canada and Manitoba Liquor Control Commission*.[258] Employees of the Liquor Control Commission in Manitoba refused to handle Seagrams whiskey, pursuant to a declaration from the British Columbia Federation of Labour that Seagrams products were "hot". The declaration arose from a lawful

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"strike" were construed to legalize the enforcement of such a clause between the recipient union and its employer *outside* this narrow exception. In Towpage Express Lines Ltd. (Calgary) and Teamsters, Local 362 (unreported, Alta. Bd. of I R., 22 Mar 1976) (file no. L.R. 1412T3), the board issued a declaration of illegal "strike" in a "hot cargo" situation.

[256] *See* pp. 587-89 *infra*.

[257] S.M. 1972, c. 75 (*replaced by* S.M. 1976, c. 45, s. 2).

[258] [1976] 1 Can. L.R.B.R. 339 (Man. L.R.B.)

strike of a Federation affiliate against the B.C. Distillery Company in British Columbia. The evidence was that the B.C. Distillery Company sent its liquors to other firms in the province to be blended. One of those firms was Seagrams. The evidence also showed that only one per cent of B.C. Distillery liquor found its way into each bottle of Seagrams' liquor. Since the Manitoba Liquor Control Commission never actually ordered its workers to handle the "hot" product, the board's comments on section 12 are *per incuriam*.[259] The board rejected the union's argument that the presence of *any* B.C. Distillery liquor in a Seagrams bottle justified refusal to handle under section 12. The board said that the words "directly facilitate" mean "that the action taken must have a fairly immediate bearing on the employer's operation and cannot be something indirect or trivial".[260] Since B.C. Distillery liquor only comprised one per cent of the Seagrams product, it could not be said that the sale of Seagrams whiskey in Manitoba would "directly" facilitate the business or operation of B.C. Distillery; rather, the B.C. Distillery component was "so diffused as to lose its identity completely".[261]

It is clear that the section is designed to accommodate the employees' legitimate interest in union "solidarity" only insofar as that would not result in undue escalation of the primary dispute. The board's interpretation limits the section's ambit to the situation where the boycott is likely to have a substantial impact on the struck employer's economic strength. The interpretation is, in effect, an expression of the "ally" principle. The board's concern to quarantine the primary dispute is demonstrated in the hypothetical of a hydro strike, where the board said that the section would not cover refusals to handle "any product or article manufactured by means of electricity, or in a building heated electrically, or moved by vehicles whose batteries were charged by electrical power . . . ".[262]

The major limitation of section 12 is that it has been held to protect the employee only if he makes an individual, as opposed to collective, decision to refuse the work. In *Retail Store Employees, Local 832* v. *Canada Safeway Ltd.* Kroft J. stated: "The statute provides that it is a matter of individual conscience on the part of an individual employee whether he wants to refuse to perform work. . . . It is not a right that the Union can organize on a collective basis for that could amount to an illegal work stoppage."[263]

Thus two employees who formulate a common decision to exercise their section 12 rights commit an unlawful "strike" for which, presumably, they can be disciplined. Given the relative facility of establishing concert in this situation, this decision deprives the section of

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[259] *Id.* at 342-43.
[260] *Id.* at 345.
[261] *Id.* at 344.
[262] *Id.* at 343.
[263] 79 C.L.L.C. 15,294, at 15,297 (Man. Q.B. 1979).

most of its potency. This is clearly a case where the subjective element in the Act should be utilized to find no "strike".

In *Seagrams*, the board also stated that the words "another employer", in section 12, mean that it does not apply where the employees who refuse to handle the "hot" product are employed by the *same* employer who is being lawfully struck.[264] Thus employees of Seagrams at its Manitoba plants could not use the section to assist Seagrams strikers in other plants. In this case the employees would have to rely on section 13 of the Labour Relations Act, which makes it an unfair labour practice for an employer to penalize an employee who has "refused to perform all or any of the duties or responsibilities of an employee who is lawfully on strike or locked out", unless the decision to apply the penalty "was not in any way affected by the employee's refusal to perform the duties and functions of an employee who is lawfully on strike or locked out . . . ".[265]

Provisions similar to section 13 of the Manitoba Act exist in the Canada Labour Code,[266] the Nova Scotia Trade Union Act,[267] and The Alberta Labour Act, 1973,[268] except that those jurisdictions rather strangely only refer to lawful strikes, not to lawful lockouts. In *Telecommunications Workers and British Columbia Telephone Co.*,[269] the Canada Labour Relations Board held that section 184(3)(*c*) applies only to boycotts by an employee of the *same* employer who is being lawfully struck. The board considered that to allow the section to be used to expand employee boycott rights beyond the conflict between the primary disputants would be to readjust the balance of bargaining power in a manner not contemplated by the Code and implicitly rejected by the Supreme Court of Canada's ruling in the *Longshoremen's* case[270] that honouring picket lines is an illegal "strike" under the Code. The board concluded that Parliament intended to recognize the convention of "hot goods" boycott only in the common employer situation where "the feelings run highest and the discipline and social stigma attached to adhering to or breaking the convention are strongest".[271] However, the board added that the scope of the section could be expanded in appropriate circumstances by a declaration under section 133 that a different employer having common control or direction with a struck employer is a single employer.[272] In the only Nova Scotia case to arise on

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[264] *Supra* note 258, at 344.

[265] S.M. 1972, c. 75 (*replaced by* S.M. 1976, c. 45, s. 2).

[266] R.S.C. 1970, c. L-1, s. 184(3)(*c*), *as amended by* S.C. 1972, c. 18, s. 1

[267] S.N.S. 1972, c. 19, s. 51(3)(*c*).

[268] S.A. 1973, c. 33, s. 153(3)(*g*). *See* p. 585 *supra*.

[269] *Supra* note 201.

[270] *Supra* note 49.

[271] *Supra* note 201, at 307.

[272] For the factors involved in a s. 133 declaration, *see generally* Association of Broadcast Employees and Calgary Television Ltd., [1978] 1 Can. L.R.B.R. 532 (Can. L.R.B. 1977). *See* in particular pp. 535-37.

the equivalent section,[273] the problem did not materialize because both strikers and boycotting employees shared the common employer.

The difficult question[274] in the legislation in Manitoba, Nova Scotia, Alberta and the federal jurisdiction is whether the boycotting employees have been ordered to perform "all or some of the duties and responsibilities" of the strikers. Each case will turn on its facts. In the only decision on point, *C.U.P.E., Local 758 and Sydney Police Commission*,[275] watchmen who were normally employed to supervise certain warehouses were on lawful strike. Policemen, members of Local 758, were ordered to supervise the warehouse in question. After initially complying with the order, the policemen subsequently refused to cross the picket line and continued their supervision from outside the premises, in disobedience of direct orders to go inside. All of the policemen concerned were disciplined, and the issue was whether their employer had violated section 51(3)(*c*).[276] The board held that the section had not been breached since the policemen had not been ordered to perform any component of the watchmen's duties. In the board's opinion there was a significant difference between "police protection" and watchmen's safekeeping and security. However, the board emphasized that an employee whose regular duties overlap those of a striking employee would not by virtue of that fact fall outside the section's protection. The policy of these sections is clearly to trade off the employees' interest in enhancing "solidarity" against escalation of the primary dispute beyond the ambit of the "ally" relationship.

It has not been determined in Manitoba, Alberta, Nova Scotia or the federal jurisdiction whether the concerted exercise of the aforesaid statutory rights would constitute a "strike" for which the employee would be disciplined. By analogy with the *Retail Store Employees*[277] case arising under section 12 of the Manitoba Labour Relations Act, there would be a "strike", but the practical effect of such a finding would deprive the sections of most of their force.

The last issue raised by the legislation in these provinces is its effect on unambiguous "hot cargo" clauses in the collective agreement which purport to legalize boycotts outside the parameters of the sections. The sections can be said to raise the negative inference that *all* unprotected "hot cargo" boycotts are illegitimate and should be nullified by the "strike" ban, except insofar as they provide a defence to disciplinary action or damages against the union in arbitration.[278] This conclusion

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[273] C.U.P.E., Local 758 and Sydney Police Comm'n, [1977] 1 Can. L.R.B.R. 481 (N.S.L.R.B.).

[274] "The very nature of the facts disclose that the issue would delight medieval theologians.": *Telecommunications Workers*, supra note 201, at 300.

[275] *Supra* note 273.

[276] Trade Union Act, S.N.S. 1972, c. 19.

[277] *Supra* note 263 and accompanying text.

[278] In *Telecommunications Workers*, *supra* note 201, at 307, the Chairman of the Canada Labour Relations Board said that s. 184(3)(*c*) "does not prevent parties to

appears to be supported by the recent court decisions in Alberta, Manitoba and Nova Scotia which effectively legislate the objective model into these provinces.[279] The federal jurisdiction has the objective model and would appear to catch such boycotts on a literal construction. On the other hand, it is arguable that the sections are intended to establish a minimum "floor of rights" upon which the parties are free to build in private bargaining. Thus, for the reasons given earlier,[280] collective agreement provisions should not be nullified as offending the scheme of the legislation.

5. *Mass Resignation and Sick-out*

It may be that employees, in order to avoid a finding of "strike" or other breaches of the collective agreement, submit formal resignations to the employer or book off sick. If this is done for the purpose of compelling the employer to make employment concessions, then it is a form of pressure which clearly offends the policy of the statutory peace obligation and should accordingly constitute a "strike". On the other hand, if two employees decide together to quit in order to take up a more attractive offer of employment elsewhere, this should not constitute a "strike". The same should be true if two employees decide together that they should go home because they are feeling ill.

In jurisdictions with the subjective component, this distinction can be accomodated under the purpose limb. There will be no "strike" if two or more employees formulate the subjective intention to quit and there is objective evidence to support that intention.[281] Similarly, if two or more employees decide together to book off sick, there will be no "strike" if the medical evidence substantiates the *bona fides* of their intention to leave work due to sickness. Of course, if the collective agreement provides a formal resignation procedure, such as a notice period, and that procedure is not complied with, the employees may be held in breach of the agreement and liable to damages, but there is still no statutory "strike".[282] However, if the objective evidence does not support the *bona fide* intention to quit, but rather supports the view that the employees are using the quit as a smoke screen for bargaining demands, there will be a "strike".

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collective bargaining from negotiating provisions in collective agreements that give employees greater rights". It is not clear whether these remarks go only to individual protection against discipline or whether they suggest that there would be no "strike" under the Code. It is submitted that probably the former is intended.

[279] *Robb Eng'r*, *supra* note 52; *Inco Ltd.*, *supra* note 52; *Alpha Constr Ltd.*, *supra* note 84.

[280] *See* pp. 578-79 *supra*.

[281] *Supra* note 126, at 45. This is implied in *Weyerhaeuser Canada Ltd.*, *supra*. The arbitration test for "quit" and the leading cases are described in *Re* Metropolitan Toronto Bd. of Comm'rs and Police Ass'n, 18 L.A.C. (2d) 7 (Adams, 1978).

[282] *Supra* note 126, at 45.

In the objective provinces, the distinction cannot be made on a literal construction of the sections. The bizarre consequence is that two employees who voluntarily resign in concert to take the better job, or who decide together to go home because they are too sick to work are engaging in a "strike"! Discretionary relief would doubtless be denied in these situations! The sensible conclusion can only be reached if a purpose component is infused into the definition, for example, by construing "work" and "output" in the mischief sense, so as to outlaw mass resignations or sick-outs designed to exert bargaining pressure. In the few cases that have arisen, the authorities have in fact applied an illegitimate purpose requirement. For instance, in *Regina* v. *Fuller, Ex parte Earles*, Jessup J. in the Ontario High Court stated:

> In passing I should perhaps say that in my view it is equally open to the employee, in the event of a failure by his employer in an essential obligation, to decline further performance of the employment contract. He would do so by simply quitting. I think that if for such reason a group of employees quit in concert they would not be striking within the meaning of the *Labour Relations Act*. It would be otherwise if they were insisting on the continuance of the employee relationship as would be evidenced by picketing activity, for instance.[283]

In *New Brunswick* v. *Lockhart*,[284] a case arising under the Public Service Labour Relations Act[285] of that province, counsel for the union conceded that resignations for blatant bargaining purposes constituted a "strike". In that case, the letters of resignation read:

> This resignation will be withdrawn when the salary schedule proposed by the employees in the unit has been agreed to by the employer and I have been assured that I will suffer no loss of pay, privileges or other benefits as a result of having tendered this resignation.[286]

The reason for finding a strike was that the purported resignation was not a resignation at all: it did not unequivocally manifest an intention to sever the employment relationship.

In *Re Gilbarco Canada Ltd. and Golden Triangle Workers*,[287] an Ontario arbitration award, Mr. Weatherhill held there to be no "strike" justifying the discharge of the grievor, where the grievor along with five other employees had booked off sick within a period of a few hours following an investigation by a foreman into whether certain employees

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[283] *Supra* note 201, at 711, 62 D.L.R. (2d) at 166. In Ecodyne Ltd. and Journeymen, Local 628, [1979] 3 Can. L.R.B.R. 174 (Ont. L.R.B.), the board held without expressly infusing a purpose component that concerted resignations did constitute a "strike", although on the facts of the case the resignations were clearly aimed at winning employment concessions.

[284] 8 N.B.R. (2d) 406 (Q.B. 1973).

[285] R.S.N.B. 1973, c. P-25.

[286] *Supra* note 284, at 407. Stevenson J. said that "such a letter does not constitute a resignation unless it is accepted by the employer". *Id.*

[287] 5 L.A.C. (2d) 293 (Weatherill, 1974). *Cf. Re* Gilbarco Canada Ltd. and Golden Triangle Workers, 4 L.A.C. (2d) 119 (Carter, 1973).

were spending too much time in conversation rather than in working. Mr. Weatherhill held that there was no "serious purpose" behind the sick-out and that it was not, therefore, a "strike", even though the action was concerted.[288] He stated that a "strike" requires evidence that employees "acted in accordance with a common understanding in a matter relating to working conditions or terms of employment or even, to put it most broadly, union activity in the most general sense".[289]

However, because the grievor's medical certificate did not prove that he was too sick to work, a one month suspension by reason of absence from work without cause was substituted for discharge. To the extent that the *Longshoremen's*[290] decision precludes consideration of a subjective element in determining the existence of a "strike", the effects in the context of concerted resignations and sick-outs are quite absurd.

II. The Future of the Compulsory Peace Obligation

The evidence demonstrates that the compulsory peace obligation is not a panacea for peacefully resolving conflict at work during the currency of the collective agreement. For the past twenty years, the annual number of recorded strikes that occur during the agreement has remained at approximately 25%.[291] It is reasonable to infer that the vast majority of those strikes are illegal in view of the low incidence of re-opener clauses for the corresponding years. For instance, in 1973 only 2.1% of agreements covering over 500 employees contained wage re-openers and 1.33% contained working condition re-openers. Yet of the 724 strikes recorded for the year, 23.1% occurred mid-term. In 1977, 5.5% of agreements contained wage re-openers and 0.3% working conditions re-openers, yet 24.4% of the total of 803 stoppages occurred mid-term. There is a divergence between the theoretical framework of the system, which assumes that strikes will not occur during the proscribed period, and the realities of the system. It is submitted that this divergence justifies a re-evaluation of the compulsory peace obligation. It is suggested in this Part that the peace obligation should be modified in order to permit greater latitude during the term of the agreement for lawful industrial conflict.

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[288] *Supra* note 287, at 296-97.

[289] *Id.* at 296.

[290] *Supra* note 49.

[291] The data is collected in Queen's Industrial Relations Centre, The Current Industrial Relations Scene in Canada 1979, 482 (W. Wood & P. Kumar eds. 1979) [hereinafter cited as Industrial Relations Scene]. Not unexpectedly, illegal in-term strikes are not damaging in terms of worker days lost. These represent only 4.1% of the total worker days lost through all strikes between 1969-70, and 9.2% between 1970-77. The strike data cited in this section is all collected from the relevant annual reports of Wood and Kumar.

It was seen earlier[292] that the common justifications for the imposition of the compulsory peace obligation are as follows: first, the maximization of "orderly", "responsible" and "efficient" industrial relations; secondly, the moral obligation to honour agreements, either by analogy with the principle of *pacta sunt servanda* or by treating the peace obligation as the *quid pro quo*, or as the *causa*, for the employer granting substantive benefits; thirdly, the "force of tradition"; and, fourthly, the provision of grievance arbitration as the "fair and equitable" substitute for private sanctions in collective agreement administration.

A. *"Orderly" Industrial Relations*

As was seen earlier, the prohibition of mid-term strikes over disputes of interest is justified in the interests of maintaining "order" in industrial relations. "Order" is not a value-free concept. As one recent work suggests, "Order looks rather different, depending as it were on which end of it one happens to be."[293]

From management's viewpoint, the peace obligation generally represents "good order". Management is relieved of the administrative pressures of on-going bargaining — the more so, the longer the duration of the agreement — and can therefore deploy its resources to increase efficiency in other areas of its operations. It can engage in long term planning, safe in the knowledge that its labour relations responsibilities are a fixed variable. It can respond flexibly to changes in the market and technological environment, pursuant to its "reserved rights" under the collective agreement, without fear of strike action. It can do all of these things without the constant threat of "guerrilla warfare" by the union. Of course, it cannot unilaterally remove existing benefits under a current agreement by serving notice to bargain in respect of them, but that is not problematic to management. It is generally the guardian of the *status quo*; it normally seeks to defend the current boundaries of the agreement, not undercut them. It would be a rare employer which would exercise any right to serve notice to bargain and lockout during the term of the agreement, especially in a favourable product market. Thus, from management's perspective, "order" is gauged in terms of "efficiency" and the compulsory peace obligation *prima facie* furthers that interest.

It does not follow that the prohibition of conflict with respect to mid-term interest disputes would always be "good" for management. The peace obligation merely relieves the symptoms of conflict; it does not cure the disease. The social and economic context, both of the work place and of society as a whole, constantly generates "disorder", without respect for the fortuitous existence of collective agreements. As the illegal strike statistics clearly demonstrate, conflict between labour

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[292] *See* pp. 525-27 *supra*.

[293] R. HYMAN & I. BROUGH, *supra* note 21, at 177.

and management does not magically disappear simply because a collective agreement is in force. The famous "sixteen factors" postulated by Professors Crispo and Arthurs to explain the upsurge of militancy in the 1960's are just as relevant today.[294] For management, the buildup of conflict among its work force, without the safety valve of the right to bargain and strike during the agreement, can result in equally as damaging manifestations of "unorganized" conflict,[295] such as high absenteeism, indiscipline, high turnover, low productivity, low morale and even sabotage. If illegal strikes do occur, the result of legal sanctions could be to sour relationships further. If the buildup of employee dissatisfaction continues into the next lawful strike period, the potential for a strike of longer duration would be increased. In these senses, the compulsory peace obligation can be seen as problematic to management.

From the union's viewpoint, the ban on in-term strikes over disputes of interest does not *prima facie* represent "good order". The union has no flexibility to respond to initiatives by management pursuant to its "reserved rights" in areas not expressly covered by the agreement. If the initiative is in respect of a "perishable" item, the union's position would be irretrievably lost by the next round of bargaining. It is no answer to say that the union should have protected its position in the current collective agreement. The most astute negotiators cannot foresee at the table all developments that may occur during the lifetime of the agreement. Few unions in practice could ever expect to win a veto power over the exercise of reserved management rights. Moreover, even in regard to matters expressly regulated by the agreement, fundamental changes could occur so as to outflank the clauses in question and perhaps even the very basis upon which the agreement was negotiated. For the union itself, pressure from rank and file members to remedy their discontent can place it in a dilemma. Is it "responsible" to its members' wishes, in which case it would support illegal action, or is it "responsible" to the compulsory peace obligation, in which case it would act as "manager of discontent" and possibly face decertification applications and raids? In these senses, the ban on in-term stoppages in support of disputes of interest can be seen as problematic to the union.

On the other hand, the union may acquire positive advantages. As with management, it is relieved of the burdens of on-going bargaining and can maximize its efforts in improving contract administration and the quality of bargaining the next time around. The compulsory peace obligation affords the union hierarchy a ready-made "excuse" to avoid demands for illegal action from rank and file militants, and to that extent can be said to maximize the union's "power over", rather than its

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[294] *See* Crispo & Arthurs, *Industrial Unrest in Canada: A Diagnosis of Recent Experience*, 23 RELATIONS INDUSTRIELLES 237, at 247-57 (1968). For a critical review of the literature in this area, *see* Smith, *Characterizations of Canadian Strikes: Some Critical Comments*, 34 RELATIONS INDUSTRIELLES 592 (1979).

[295] *See* R. HYMAN, *supra* note 56.

"power for". This would clearly be of concern to the militant members, but not to the union hierarchy nor the employer. Furthermore, it may be argued that the union is protected against the employer giving in-term notice to bargain and lockout in respect of items which it wants to modify.[296] In these ways, the compulsory peace obligation can be seen as non-problematic to the union.

From the viewpoint of the "public interest", the ban on mid-term strikes over disputes of interest is generally regarded as representing "good order". Whereas public policy endorses collective bargaining as the most desirable institution of job regulation, "responsible" collective bargaining is viewed as that which emphasizes the peace-keeping function at the expense of the joint rule-making function. However, as one commentator has suggested, the concept of national interest "has a curious habit of coinciding with the interests to which the speaker owes allegiance".[297] As was suggested earlier, the peace obligation restricts the union's power to challenge the frontiers of managerial control in the interests of maximizing "efficiency". Public policy clearly equates "order" with economic "efficiency" — the potential for "guerrilla warfare" from continuous bargaining with a full-scale right to strike would wreck the economy! This is, of course, a management perspective of "good order". Challenges to managerial control by employees who strike illegally during the agreement become illegitimate in terms of the "good of all society" and are to be universally condemned.

Most industrial relations theorists would accept this justification. The widely accepted "pluralist" perspective of collective bargaining which, while recognizing the endemic conflict between labour and management, nonetheless tacitly assumes periodic compromise and "unity of interest" for the duration of the agreement, fails to question whether there is inherent "disorderliness" within society itself. Other theorists prefer to view industrial relations in terms of a "political economy",[298] thereby encompassing within the subject the socio-economic structure of society-at-large. If it is concluded that society itself is repressive and exploitive of the working class (who are then not represented by the "public interest"), it would not constitute "disorderliness" that workers be free to challenge managerial control wherever and whenever they see the need. This is to question the fundamental structure of society itself, a task beyond the scope of this paper. However, the point is that appeals to the "public interest" will not *ipso facto* justify the peace obligation. The question must be faced: whose "interest" is really being protected by appeals to preserve the *status quo*

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[296] However, as was suggested at p. 592 *supra*, the likelihood of employers interrupting production in their operations by wholesale "guerrilla warfare" is remote.

[297] K. WEDDERBURN, THE WORKER AND THE LAW 287 (1965).

[298] The phrase was coined and its relevancy was explored in R. HYMAN, INDUSTRIAL RELATIONS: A MARXIST INTRODUCTION (1975). The author's thesis developed further in R. HYMAN & I. BROUGH, *supra* note 21.

in society-at-large and industrial peace during the currency of the agreement?

In summary, it is suggested that the imposition of a ban on conflicts of interest during the collective agreement represents, for the most part, "good order" for management and "disorder" for unions and employees, although that will not always be the case. The next question is whether the system contains existing safeguards for the parties to respond to problems without necessitating major revisions of the peace obligation. There are two potential safeguards: private collective agreement regulation and statutory modifications to the absolute peace obligation.

As to the first, it is clear that unions can protect themselves against some foreseeable mid-term pressures. For instance, the increase in inflation since 1973 and the advances in technological change have probably been responsible for the discernible trend towards shorter collective agreements over the same period. Thus in 1967 only 18% of agreements covering over 500 employees were for one year, whereas the figures for 1976, 1977 and 1978 were 51%, 69% and 53% respectively. Also, the pressures of inflation have been met by the greater use of C.O.L.A. clauses. In 1973, only 12.86% of agreements covering over 500 employees included such a clause, compared with 34.8% in 1979.[299] Of course, as with the issue of duration, C.O.L.A. clauses are negotiable items and their degree of real protection against inflation will ultimately depend on relative bargaining power. In fact, the evidence suggests that C.O.L.A. increases do not keep up with the cost of living at the aggregate level.[300]

Similarly, it may be argued that the union can protect itself against in-term management initiatives by appropriate language in the agreement, such as union veto power over the application of the reserved management rights article, and provisions regulating the implementation and effects of technological change. In fact, few employers would be expected to sign away their residual rights in this fashion. In 1979, only 12.4% of agreements covering over 500 employees contained provision for formal bilateral machinery with jurisdiction over technological change, and 71.4% of agreements failed to require advance notice to the union of introduction of new work methods. Surprisingly, for the same year, 91.7% of agreements did not even require notice of lay-off pursuant to technological change![301] Thus the evidence suggests that management is highly reluctant to give up the key areas of its "reserved rights" in collective bargaining. For the union, it would be tough to proceed to conflict over such issues unless the problem had already manifested itself in the work place. Therefore collective agreement protections of this kind

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[299] Data is taken from INDUSTRIAL RELATIONS SCENE, *supra* note 291

[300] *Id.* at 503.

[301] *Id.* at 451.

will rarely be priority items until it is "too late" and the union will have lost the right to bargain and strike!

In the absence of express provisions limiting the exercise of management rights, the union's only protection during the currency of the agreement is the inherent proviso that such "rights" be exercised "non-discriminatorily", in "good faith" and "reasonably".[302] The "reasonableness" limb, connoting an objective standard by which management initiatives are to be tested, potentially affords the greatest protection. It would enable an arbitrator to block a particular management initiative because a "reasonable" employer, in the circumstances of the case, would never have made the substantive decision in question. However, in the few cases which have held management to be acting "unreasonably", the decisions have turned on procedural rather than substantive "unreasonableness". It is easier to identify "objective" standards of procedural fairness than "objective" standards of substantive fairness. To impose the latter comes very close to interest arbitration; to impose the former merely reflects an existing widespread acceptance of the principles of "natural justice". Thus, in one recent case, an arbitration board refused to find any inherent or implied duty of "reasonableness" governing management's decision to increase teacher workload during the currency of the agreement.[303] The counter-argument would be that if the "reasonableness" provision exists, the parties have tacitly agreed to the arbitrator making the substantive decision, so that theoretically the arbitrator is respecting the parties' agreement. It is not uncommon for the parties to defer a "quasi-interest" dispute to a "rights" arbitrator because, for instance, they cannot agree on the substance at the table and do not at that time wish to proceed to impasse. However, it is probable that most arbitrators would be reluctant to read into the agreement an across-the-board standard of the "reasonable employer" as governing the pith and substance of management decisions. It is difficult to say that most employers would intend to

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[302] Recent authorities favouring such an inherent jurisdiction are *Re* I.N.C.O. Ltd. and U.S.W., Local 6500, 14 L.A.C. (2d) 13, at 18 (Shime, 1977); *Re* Metropolitan Toronto and Civil Employees, Local 43, 16 O.R. (2d) 730 (Div'l Ct. 1977); *Winnipeg Teachers*, *supra* note 33, at 705, 59 D.L.R. (3d) at 235 (dissent of Laskin C.J.); Rural Gen. Hosp., Dist. No. 93 and C.U.P.E., Local 1240 (unreported, Prowse, 20 June 1979) (Calgary); *Re* Fishermen's Co-op. Ass'n and Amalgamated Shoreworkers, Local 1674, 19 L.A.C. (2d) 308 (Weiler, 1978); *Re* Falconbridge Nickel Mines Ltd. and U.S.W., 21 L.A.C. (2d) 280 (Brunner, 1978); *Re* Hiram Walker & Sons Ltd. and Operating Eng'rs, Local 100, 24 L.A.C. (2d) 186 (Brent, 1979); *Re* Mississauga Hydro-Electric Comm'n and Elec. Workers, Local 636, 24 L.A.C. (2d) 1 (Rayner, 1979).

[303] *See Re* Athabasca No. 12 and Alberta Teachers' Ass'n, Athabasca Local, 19 L.A.C. (2d) 1 (Sychuk, 1978). Other recent cases rejecting the inherent proviso include *Re* Government Employees' Ass'n and Nova Scotia Civil Service Comm'n, 14 L.A.C. (2d) 69 (Eaton, 1976); *Re* Metropolitan Toronto and C.U.P.E., Local 43, 23 L.A.C. (2d) 165 (Picher, 1979); *Re* Kaiser Resources Ltd. and U.M.W., Local 7292, Dist. 18, 23 L.A.C. (2d) 50, at 58 (Ferris, 1979).

subject themselves to such a restraint when they sign off the management rights article, or that the collective bargaining regime established by the legislation implicitly envisages such a restraint. It may well be, therefore, that the inherent "reasonableness" proviso will be limited to cases of procedural rather than substantive "reasonableness", although there will clearly be a gray area between the two.

As to the second safeguard, the labour relations legislation of some jurisdictions has recognized that industrial relations operates in a dynamic environment and that the parties may wish to adjust their agreement accordingly, by economic pressure if necessary. Thus the peace obligation is "qualified" in the federal jurisdiction,[304] Nova Scotia,[305] New Brunswick,[306] Manitoba[307] and Newfoundland,[308] so that the parties can designate in the agreement those articles which are to be subject to "re-opening" and ultimately resolvable through economic sanctions. In Manitoba, the effect of the parties acquiring a lawful strike/lockout position pursuant to a re-opener article is that the entire collective agreement terminates and the parties are free to bargain and proceed to impasse on *any* item. Elsewhere, the bargaining process is constrained in that the parties can only strike/lockout over the designated items. Although the parties could agree to negotiate over any item and make written amendments to the collective agreement where appropriate, it would arguably violate the duty to bargain in good faith for either side to set up non-designated items as pre-conditions to bargaining over the designated ones. Thus neither party could utilize the re-opener clause as a smoke screen for bargaining over other items. This restriction on free-wheeling bargaining, and the fact that the union has to "contract in" to the re-opener provisions, partially explain the relatively low incidence of re-opener clauses.[309] Management would be reluctant to trade off guaranteed stability, especially regarding its "prerogatives", whereas unions would have to make major concessions elsewhere in order to re-open on a wide scope of bargainable issues. Moreover, the union would have to be able to foresee the need for a re-opener provision at the bargaining table. This may be particularly difficult with respect to work organization items where the fluid economic context of the business could generate quite unexpected changes, although less so in respect to compensation. Thus from the union's viewpoint, the statutory re-opener provisions do not provide great potential for on-going joint regulation during the life of the agreement.

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[304] Canada Labour Code, R.S.C. 1970, c. L-1, s. 147(2), *as amended by* S.C. 1972, c. 18, s. 1; and s. 180, *as amended by* S.C. 1972, c. 18, s. 1, S.C. 1977-78, c. 27, s. 63.

[305] Trade Union Act, S.N.S. 1972, c. 19, ss. 45, 46.

[306] Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 91(3).

[307] The Labour Relations Act, S.M. 1972, c. 75, ss. 54(3), 77

[308] The Labour Relations Act, 1977, S.N. 1977, c. 64, s. 95(2).

[309] *See* p. 591 *supra*.

The legislation in Manitoba,[310] British Columbia,[311] the federal jurisdiction[312] and Saskatchewan[313] has recognized the inadequacy of the peace obligation by permitting unions to respond during the agreement to the implementation of technological changes that could have a potent impact on the work force and the union's own position. In many cases, such changes cannot be foreseen at the bargaining table, and to postpone their regulation until the next round of bargaining may mean that the union's ability to respond effectively is irretrievably lost. Accordingly, the legislation in those jurisdictions permits the union to serve notice to bargain and (except for Saskatchewan) acquire a lawful strike position if certain pre-conditions are satisfied. It is beyond the scope of this paper to analyse the legislation in detail. However, there are certain notably tough pre-conditions which help to explain why the provisions are utilized so infrequently.

First, the definitions of "technological change" are unclear and may be open to restrictive interpretation. For instance, the words "the removal by an employer of any part of his work, undertaking or business" in section 43(1)(*c*) of the Saskatchewan Act have been held not to encompass a *complete* closure of operations but only the *partial* removal of "work, undertaking or business" from one place to another or from one work group to another.[314] In addition, the implementation of the change must be likely to affect the terms and conditions or security of employment of a "significant" number of employees in British Columbia, Saskatchewan and the federal jurisdiction. "Significant" is undefined in British Columbia and the federal jurisdiction, but not in Saskatchewan where the parties themselves may agree on the number in the collective agreement.[315] In British Columbia, "significant" is more narrowly defined in that the change must have the additional effect of significantly altering the basis upon which the agreement was negotiated.[316] In the federal jurisdiction[317] and Saskatchewan,[318] the change could destroy the basic assumptions upon which the agreement was reached but not create in the union a right to renegotiate unless its members are adversely affected. The position in Manitoba[319] is broader in that the change need only have an alternative effect of either adversely

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[310] The Labour Relations Act, S.M. 1972, c. 75, ss. 72-75.

[311] Labour Code, R.S.B.C. 1979, c. 212, ss. 74-78.

[312] Canada Labour Code, R.S.C. 1970, c. L-1, ss. 149-53, *as amended by* S.C. 1972, c. 18, s. 1.

[313] The Trade Union Act, R.S.S. 1978, c. T-17, s. 42.

[314] Retail Store, Local 568 v. Sunshine Uniform Supply Serv. Ltd., 78 C.L.L.C. 17,196 (Sask. L.R.B. 1978).

[315] In the absence of such an agreement, a formula is provided in Sask. Reg. 171/72.

[316] Labour Code, R.S.B.C. 1979, c. 212, s. 76(1)(*b*).

[317] Canada Labour Code, R.S.C. 1970, c. L-1, s. 152(1), *as amended by* S.C. 1972, c. 18, s. 1.

[318] The Trade Union Act, R.S.S. 1978, c. T-17, s. 43.

[319] The Labour Relations Act, S.M. 1972, c. 75, s. 72(1).

affecting a significant number of employees, or of altering significantly the basis upon which the agreement was negotiated. Thus unions which subsequently discover that their bargaining strategies were based on misconceived assumptions about the work organizational process do not have to live with the agreement for its duration — by analogy with the principle of *rebus sic stantibus*.

Secondly, the legislation in the federal jurisdiction and Manitoba establishes the "current regulation bar", whereby the statutory provisions are ousted if the collective agreement contains provisions "intended to assist employees . . . to adjust to the effects"[320] of a technological change and expressly exempts the application of the statutory provisions. One would expect employers who anticipate the possibility of technological change to pay highly in the compensation component of their package in order to retain their flexibility. It has been suggested in the case of the Canada Labour Code that this bar is most responsible for the lack of use of the statutory provisions.[321] The exemption is potentially wide in that basic provisions such as seniority governing lay-off and recall can be argued to be "intended to assist employees . . . to adjust to the effects" of the change. A union which agrees to an express waiver of the statutory provisions in the belief that its agreement does not contain articles falling within the exemption may be unpleasantly surprised!

Thirdly, the right to strike over a technological change is curtailed to various degrees between the jurisdictions. The right is broadest in Manitoba where the entire agreement terminates ninety days after service of notice to bargain and where the union can strike over any item, not just the technological change.[322] In the federal jurisdiction[323] and British Columbia,[324] the parties can only strike over items which relate to assisting employees, affected by the change, to adjust thereto. Moreover, in those jurisdictions, unlike Manitoba, the parties require consent of the Canada Labour Relations Board in the case of the Canada Labour Code,[325] and of an arbitration board in the case of British Columbia,[326] in

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[320] Canada Labour Code, s. 149(2)(*c*); Manitoba: The Labour Relations Act, s. 75(*c*). The other prerequisites are the "prior bargaining" bar (*e.g.*, Manitoba Act, s. 75(*a*)), the "in-term" bargaining bar (*e.g.*, Manitoba Act, s. 75(*b*)) and waiver (*e.g.*, Manitoba Act, s. 75(*e*)). Consideration of these bars is beyond the scope of this discussion.

[321] Marc Lapointe, Chairman of the Canada Labour Relations Board, has suggested that this provision is the widest "escape hatch" in the statute and is most responsible for the statute not being utilized. "The problem has not been to breathe life into a body; there was no body." *See* Lapointe, *Breathing Life into Law*, in PROCEEDINGS OF THE TWENTY-FIFTH ANNUAL CONFERENCE OF THE INDUSTRIAL RELATIONS CENTRE, MCGILL UNIVERSITY 142, at 146 (F. Bairstow ed. 1977).

[322] This is the effect of The Labour Relations Act, S.M. 1972, c. 75, s. 72(3).

[323] Canada Labour Code, R.S.C. 1970, c. L-1, s. 152(1), *as amended by* S.C. 1972, c. 18, s. 1.

[324] Labour Code, R.S.B.C. 1979, c. 212, s. 77(1).

[325] R.S.C. 1970, c. L-1, s. 152(2), *as amended by* S.C. 1972, c. 18, s. 1.

[326] Labour Code, R.S.B.C. 1979, c. 212, s. 77(1).

order to serve notice to bargain and so acquire a lawful strike/lockout position. In Saskatchewan, whereas the union can serve notice to bargain in respect of measures designed to assist the employees to adjust to the effects of the change, it is unclear whether it can acquire a lawful strike position by virtue only of serving notice to bargain. If the collective agreement contains a negotiated peace obligation, section 42 does not expressly state that service of notice to bargain will overrule such a clause.[327] There are no decisions on point. It is probable that the right to strike will not be acquired unless either the collective agreement does not contain any "no strike" ban or contains one which is qualified by express exclusion of a section 42 notice. In these jurisdictions, there is nothing to prevent the parties from voluntarily negotiating over non-technological change items and consensually amending their agreement accordingly, but it would presumably violate the duty to bargain in good faith for either side to set up such an item as a pre-condition to bargaining over a technological change item. This contrasts sharply with the free-wheeling bargaining permitted in Manitoba.

Thus, although the labour relations legislation in these four jurisdictions does recognize a legitimate role for mid-term industrial action in response to technological changes, the scope for such action is relatively narrow and, in practice, the provisions are rarely utilized.[328] That may also be partially explained by the reluctance of unions to proceed to impasse in a situation where their members' jobs may be threatened and their bargaining power at a low ebb. However, this will not typify all technological change scenarios as, for instance, where the company's short-term profitability depends on the rapid implementation of the change. Here, one would expect that the union's bargaining position would be favourable, notwithstanding that part of its membership stands in jeopardy.

It is therefore submitted that, even taking account of the above safeguards under the collective agreement and specific statutory exceptions to the absolute peace obligation, the scope for on-going bilateral job regulation during the agreement is narrow. Whether this is justified depends ultimately on the ideological preferences of the reader. For those who believe that pre-eminence should be given to the philosophy that persons who will be substantially affected by decisions of social and political institutions should have effective involvement in the making of those decisions, the position is unsatisfactory. Such is also the opinion of those, viewing industrial relations in terms of a "political economy", who see labour-management relations as an integral part of class conflict within our society. However, even for those who give pre-eminence to the peace maximization function of collective bargaining, the fear that a wider scope for in-term bargaining would lead to intolerably damaging economic conflict is not necessarily true. As was suggested earlier,

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[327] The Trade Union Act, R.S.S. 1978, c. T-17, s. 42.

[328] *See* the comments of Marc Lapointe, *supra* note 321.

management as guardian of the "*status quo*" is unlikely to curtail production during the collective agreement by initiating wholesale lockouts aimed at wiping out existing union benefits. Similarly, strikes are costly for employees too. Notwithstanding these considerations, the legally enforceable peace obligation assumes a total irresponsibility on both sides as far as feeling any moral obligation to live with their agreement. However, even in Saskatchewan, the evidence suggests that the majority of agreements contain a negotiated peace obligation.[329] This may be because unions either cannot win an open agreement or see them as non-priority "trades", but it may equally reflect an underlying ideology that agreements *ought* to be respected, that incessant combat is inappropriate so long as the agreement is perceived as fulfilling its envisaged role. It is trite that collective bargaining assumes a continuing relationship between the parties. It is unlikely that either side would readily jeopardize that long-term relationship, and the benefits to be expected therefrom, by constantly exploiting temporary advantages in the short term.

Opponents of this view would point to the "British disease"[330] as demonstrating the havoc that results from a dynamic system of collective bargaining. However, closer analysis of the English position suggests that the incidence of unconstitutional strikes (those in breach of procedure) is concentrated in a few "strike prone" industries which are typified by "disorderly" domestic bargaining often associated with degenerate payment-by-results systems, and by disputes procedures that are inadequate in terms of comprehensiveness, efficiency and acceptability.[331] Moreover, the common allegation that the British pattern of numerous unconstitutional strikes of short duration is unacceptably damaging in economic terms is difficult to justify by the evidence.[332] In terms of worker days lost, the Canadian pattern of numerically fewer, but considerably longer strikes involving more workers is *prima facie* more costly. It may be that the real criticism of the British collective bargaining system is that strike laws make the strike more *effective* in the sense of requiring management to take heed of the problems raised by workers. If so, then the argument becomes a matter of personal ideology. There is no magical, mathematically "correct" point of balance in the scales of bargaining power. That point is a value judgement, provided

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[329] In 1977, 36.09% of collective agreements did not include any peace obligation, although this represented the majority of union labour (*i.e.*, 66.01%) in the province. *See* SASKATCHEWAN DEPARTMENT OF LABOUR, NEGOTIATED WORKING CONDITIONS IN COLLECTIVE BARGAINING AGREEMENTS (1978).

[330] *Viz.* the relatively high incidence of unofficial and unconstitutional strikes. *See* R. HYMAN, *supra* note 56, ch. 2.

[331] H. CLEGG, THE SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN 319-31 (2d ed. 1972).

[332] *See* H. Turner, Is Britain Really Strike Prone? (Occasional Paper 20, Cambridge, 1969). *Contra* McCarthy, *The Nature of Britain's Strike Problem*, 8 BRIT. J. INDUS. REL. 224 (1970).

always that unilateral regulation does not replace bilateral regulation, and there is no evidence of that having occurred in British industries! It is therefore suggested that wholesale economic disaster would not necessarily flow from permitting the parties to bargain collectively with resort to sanctions during the lifetime of the agreement. Provided that radical changes of circumstance do not undercut the envisaged rules of the agreement, that management is not perceived to be abusing its "reserved rights", that the dispute resolution procedures in the agreement work effectively, and that management discharges its responsibility of negotiating and policing a workable agreement, then the parties need not be expected to engage in "guerrilla warfare".

B. *The Moral Obligation to Respect the Agreement*

This is commonly expressed by reference to the principale of *pacta sunt servanda*, namely that the parties are and should be morally and legally bound to observe the "agreement" they have made. One may also refer to the theory of *causa* or *quid pro quo*, and state that the concession of substantive benefits by the employer is and should be reciprocated by the union's promise not to strike during the life of the agreement. The weakness of these arguments is that they purport to transform an "is" into an "ought". That agreements *should* be observed is generally accepted, but this begs the question of what is being agreed to in the first place. Where the peace obligation is imposed compulsorily by statute, the parties can hardly be said to have "agreed" to it (except perhaps in the highly unrealistic sense that they need never have organized for collective bargaining and submitted themselves to the statute initially). Similarly, unions can hardly be regarded as consenting to an *imposed* peace obligation as part of their "consideration" for the contract. Absent true "agreement", it is impossible to deduce the "ought" — that the peace obligation "should" apply — from the "is" — that the peace obligation "does" apply by compulsion.

It is not inconsistent with theories of moral obligation to say that the parties should be allowed to conclude a collective agreement which can be legally enforced through arbitration, but which the parties can agree to amend in whole or in part by procedures of their own making, including economic sanctions if they so choose. Whether this position should represent the law is simply a question of social expedience: would it further the social and economic purposes of collective bargaining? As the late Professor Kahn-Freund pointed out, the principles of *pacta sunt servanda* and *causa* simply do not answer that question. They are, as legal principles, "rule[s] of social expediency and not . . . rules[s] of ethics".[333] The imposition of a peace obligation by statute should

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[333] Kahn-Freund, *Pacta Sunt Servanda — A Principle and Its Limits: Some Thoughts Prompted by Comparative Labour Law*, 48 TUL. L. REV. 894 (1974).

therefore be evaluated in that light alone. Were the existence and breadth of the peace obligation a matter of voluntary negotiation, as in Saskatchewan, the moral arguments are much stronger: if the parties choose to risk tying their hands for the duration of the agreement, then so be it! A major policy goal of collective bargaining is, of course, collective "freedom of contract".

C. *The "Force of Tradition"*

This argument sees the compulsory peace obligation as one of those "common ideologies" or "shared understandings" which give the industrial relations system its coherence and stability and which should not, therefore, be lightly cast aside. Moreover, the tradition is said to derive from some sort of "social contract" between labour and the state, whereby the *quid pro quo* for the state conferring statutory collective bargaining rights on unions is their acceptance of the peace obligation. The defect in this diagnosis is its assumption of a static environmental context for industrial relations. As Professor Kahn-Freund has suggested, "Only an extreme conservative justifies a social institution by its existence. Respect for tradition is one thing, refusal to reform is another".[334] Thus the absolute peace obligation introduced in wartime conditions by P.C. Order 1003[335] (and subsequently copied by most provinces) has been subsequently modified to permit mid-term strikes on designated re-openers and technological changes in some jurisdictions, in recognition of the reality that a static system of collective bargaining is overly destructive of joint regulation in a fluid socio-economic environment. Although these provisions have not been utilized widely by the parties, they nevertheless mark a changing in the "tradition". There is no reason why the "barrier of tradition" could not and should not be adjusted to accommodate an even greater role for mid-term economic conflict.

D. *Grievance Arbitration*

According to this argument, in return for the employer's and society's guarantee of industrial peace during the lifetime of the agreement, the union is granted compulsory arbitration as the "just and equitable" method of resolving conflicts arising under the agreement. The assumption is that grievance arbitration is operating as "just and equitable" dispute resolution machinery. Insofar as "good"[336] disputes

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[334] O. KAHN-FREUND, LABOUR AND THE LAW 133 (1972).

[335] Wartime Labour Relations Regulations, P.C. 1944-1003, [1944] 1 CANADIAN WAR ORDERS AND REGULATIONS 439 (No. 8) (made under the War Measures Act, R.S.C. 1927, c. 206, s. 3).

[336] *See* Getman, *Labour Arbitration and Dispute Resolution*, 88 YALE L.J 916 (1979).

procedures are gauged by their "efficiency" (effective disposal rate with respect to accessability, speed and low cost), their "comprehensiveness" (range of issues covered) and their "acceptability" (the extent to which the parties are satisfied — largely a function of "efficiency" and "comprehensiveness"), arbitration has faltered on all counts. The short supply of quality arbitrators, combined with the injection of greater legalism and the propensity for judicial intervention on review has increased delays and expense so as to impair the efficiency and acceptability of the process. The "reserved rights" theory of management prerogative, in its traditional form, limits the "comprehensiveness" of issues covered, as was suggested earlier.[337] When abused by unscrupulous employers, the system is tantamount to a form of economic coercion against the union, which must either take a rash of costly arbitrations or potentially lose the confidence of its membership. It is no surprise that Arthurs and Crispo highlighted the inefficiency of the process as a significant cause of industrial unrest in the 1960's.[338]

Although there have been important reforms of the arbitration process in recent years,[339] which may help to reduce the potential for illegal stoppages, the theme of this paper is that the peaceful resolution of mid-term disputes is not necessarily "good" for all actors in the system. Streamlining the administrative machinery of arbitration may be all very well for purposes of maximizing peace, but for those who see the primary attraction of collective bargaining as being to potentially extend the ambit of bilateral job regulation, the legislative peace obligation must be amended to permit greater resort to lawful economic sanctions during the currency of the agreement.

With the possible exceptions of section 114 of the British Columbia Labour Code[340] and the growing acceptance of an inherent "reasonableness" restraint on the exercise of "reserved rights", the reforms are largely bureaucratic in nature. This would be true, for instance, of the provisions for conciliation and adjudication by the Labour Relations Boards in British Columbia,[341] of the provision for single arbitration in the model clause in the Alberta legislation,[342] and of the provision in Nova Scotia for a one-third provincial government contribution to the arbitrator's fees.[343] Such is also the case with regard to recent amendments to the Ontario Labour Relations Act[344] which permit the

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[337] *See* pp. 596-97 *supra*.

[338] *Supra* note 294.

[339] It is beyond the scope of this discussion to detail all the developments. For an overview, *see* LABOUR RELATIONS LAW CASEBOOK GROUP, LABOUR RELATIONS LAW: CASES, MATERIALS AND COMMENTARY ch. 7, at 105-16 (2d draft ed. B. Adell 1978).

[340] R.S.B.C. 1979, c. 212.

[341] The procedure is described in LABOUR RELATIONS LAW CASEBOOK GROUP, *supra* note 339, at 107-08.

[342] The Alberta Labour Act, 1973, S.A. 1973, c. 33, s. 138.2, *as amended by* S.A. 1977, c. 77, s. 11.

[343] Trade Union Act, S.N.S. 1972, c. 19, ss. 41(2), (3).

[344] The Labour Relations Act, R.S.O. 1970, c. 232, s. 37a, *as amended by* S.O. 1979, c. 32, s. 1.

Minister, upon application of either party, to remit a grievance to a single arbitrator, notwithstanding provisions in the collective agreement establishing an arbitration board. Interestingly, the new procedure provides for the appointment at the Minister's discretion of a "settlement officer" who is charged with attempting to secure a voluntary settlement between the parties prior to arbitration.

The recent judicial and legislative trend against active court review of arbitration awards does, of course, go towards upholding the content of arbitration awards.[345] Very often in the past, the courts left the impression that they were utilizing the legal tools of review whenever the arbitrator's substantive decision, to use the words of Professor Christie, "crossed their threshold of shock".[346] This present trend also has the important administrative advantages of increasing speed and reducing cost. Similarly, in some industries, the parties themselves have responded by creating innovative dispute settlement techniques designed to achieve a more effective and expeditious handling of grievances.[347] In addition, the major unions are operating lay advocate training programs to reduce legal fees. Such improvements, while welcome in furthering the objective of efficient disposition of "rights" disputes, do not tackle the problem of expanding the rule of joint regulation over "interest" disputes during the life of the agreement. The next section considers some possible ways in which that might be done.

E. *Some Alternatives*

The current law regulating relationships during the currency of a collective agreement features two principles which, it is suggested, should be retained. First, the collective agreement should remain a legally enforceable instrument. The strike/lockout should not and need not be utilized as an enforcement device to secure compliance with existing obligations: legal remedies are best suited for this. Rather, the proper use of industrial sanctions is in changing existing terms and conditions. Secondly, grievance arbitration has, notwithstanding its faults, proven to be a relatively successful method of resolving disputes over the meaning and application of collective agreement provisions. Again, the proper role for industrial sanctions lies in changing existing provisions, not in resolving differences as to their meaning.

The first possibility for reform is that any management initiative made pursuant to its "reserved rights" should give the union the right to elect to commence bargaining and to strike in respect of the initiative in

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[345] *See, e.g., Volvo Canada, supra* note 29.

[346] Former Chairman of the Nova Scotia Labour Relations Board, Professor of Law, Dalhousie University.

[347] *See, e.g.*, INDUSTRY AND EXPEDITED ARBITRATION: ALTERNATIVES TO TRADITIONAL METHODS (Federal Mediation and Conciliation Service Labour Canada, 1977).

question, provided that an arbitrator has initially determined that the initiative is not covered by the express provisions of the collective agreement. One present disadvantage, from the union viewpoint, is that the delay in arbitration proceedings may mean that the issue is irretrievably lost if it is a "perishable" one. However, this could be avoided either by a "*status quo*" provision whereby the implementation of the initiative must be delayed pending the outcome of arbitration, or by special expedited arbitration procedures fashioned by the parties. The "*status quo*" approach would raise the thorny questions of whether an "essentiality" proviso should be included in order to permit management to respond to emergencies, and, if so, which institution would be best suited to determine the existence of an "essentiality". The problems might also be avoided by making expedited procedures for determination of the entire issue available in proceedings before labour relations boards rather than private arbitrators. A second disadvantage from the union viewpoint is that it is relegated to a reactive role. It cannot take the initiative to reopen on any given issue, but must wait until management acts before it can respond. The third, and most important disadvantage, is that the union can do nothing with regard to issues expressly covered by the agreement, even where a fundamental change of circumstance may have undermined the article in question or even the very basis of the agreement. The agreement, or important parts of it, may not be operating as envisaged, but the union must live with it for the duration. Fourthly, the scope of bargaining and strike action is very restrictive, limited as it is to the subject-matter of management initiative. Attempts by either side to establish a "free-wheeling" negotiating atmosphere could result in a proliferation of bad faith bargaining and unfair labour practices, and could initiate a move towards the American distinction between "mandatory", "permissive" and "prohibited" bargaining items. The latter would be inconsistent with the general trend in Canada which is not to focus the unfair labour practice on the content of bargaining items but to regulate the procedures by which such items are voluntarily negotiated.[348] This risk could be avoided by allowing the parties to bargain and strike over everything, as is the case under the Manitoba provisions regarding in-term technological change.[349]

One possbile extension of such an approach would be to permit either side to serve notice to bargain over items covered by the collective agreement, if "fundamental change of circumstance" has or is likely to frustrate the envisaged role of the article or of the agreement as a whole. Something akin to this presently exists in most statutory technological change provisions, which require the change to "alter significantly the basis upon which a collective agreement was negotiated".[350] Given that

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[348] *E.g.*, Newspaper Guild, Local 205 v. Journal Publishing Co., [1977] Ont. L.R.B.R. 309, at 323 (Carter).

[349] The Labour Relations Act, S.M. 1972, c. 75, s. 72(3).

[350] *E.g.*, Labour Code, R.S.B.C. 1979, c. 212, s. 76(1)(*b*).

the test must necessarily be vague, the vital question is: who decides? Private arbitration would raise the same problems posed earlier. Expedited procedures in the labour relations boards would be better, although one must seriously question whether the boards would welcome having to make such a controversial and emotive decision on a matter going to the very substance of the collective agreement. Whereas the boards presently determine the "timeliness" of strike action, that determination is essentially couched in procedural terms rather than in the substantial sense of whether there has been fundamental change of circumstance. The analagous provision in the statutory technological change provisions has never been considered in a reported decision. The British Columbia Labour Relations Board's dissatisfaction with having to make equally if not less controversial determinations, pursuant to section 8(*c*) of the Essential Services Disputes Act,[351] is well known. The danger is that the parties may lose faith in the boards because of their decisions in this area, which could spill over to undermine the less controversial aspects of the boards' activities. The parties themselves are surely in the best position to know whether their agreement is working as contemplated.

The approach favoured by the author is similar to the current position in Saskatchewan. Either side would be allowed to give notice to bargain and strike/lockout in respect of any item during the currency of the collective agreement, except for any negotiated peace obligation in the agreement. The statutorily-imposed peace obligation would disappear. It would be for management to win, in negotiations, a voluntary peace obligation which could be either absolute or qualified, depending on the outcome of bargaining. Unlike in jurisdictions presently having statutory re-opener provisions, management would have to "contract in" to a peace obligation by making concessions to the union in other areas. There is no reason why management should have the automatic benefit of a peace obligation, without having to buy it from the union. Both sides would commence with a presumed right to serve notice to bargain and strike/lockout on anything and it would be for joint regulation to determine whether that right would be abrogated in full or in part. The only exception would be that the parties could not re-open a negotiated peace obligation. This would go beyond Professor Weiler's suggestion[352] that the peace obligation be negotiable with respect to items not expressly covered by the agreement. In the interest of furthering bilateral job regulation, there is no reason why the parties should be prevented from agreeing that either could revivify the obligation to bargain, with economic sanctions available regarding expressly agreed upon articles. If

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[351] S.B.C. 1977, c. 83, *as amended by* S.B.C. 1979, c. 42, s. 11. *See* Weiler, *Making a Virtue of a Necessity: Reflections on Strikes by Essential Public Employees*, in PROCEEDINGS OF THE INDUSTRIAL RELATIONS CENTRE TWENTY-SEVENTH ANNUAL CONFERENCE, McGILL UNIVERSITY 5, at 5-16, 20-21 (1979).

[352] P. WEILER, LABOUR ARBITRATION AND INDUSTRIAL CHANGE — TASK FORCE ON LABOUR RELATIONS STUDY NO. 6 at 134-38 (1969).

one side cannot trust the other to exercise its right "responsibly", then it is always free to bargain for "fundamental change of circumstance" to be a prerequisite to any such action. Nor would this approach erode the twin features of legally enforceable agreements and grievance arbitration. Contract administration would simply proceed in the traditional manner until and unless either party elected to go to conflict over items to be changed. Once changes were agreed to, they would be administered in the usual way. In addition, this view would subject the legal status of mid-term "cut price" industrial action — namely overtime bans, work to rule, refusal to handle "hot cargo", honouring picket lines and so forth — to bilateral job regulation by the parties. The extent to which such action might be legitimate would be determined by collective bargaining, and disputes of interpretation would be resolved in private arbitration. It is submitted that this approach would maximize what, in the author's view, is the most important advantage of collective bargaining — the potential for widening the scope of bilateral job regulation.

III. Conclusion

First, it is submitted that the "strike" definitions in the objective component jurisdictions are too blunt an instrument to permit, on a literal construction, a satisfactory balancing of the competing interests involved in the determination of whether particular job action should constitute an illegal "strike" under the legislative scheme. In particular, "strike" has been interpreted with an over-emphasis on the policy of guaranteeing the employer total freedom from concerted interruptions of production, at the expense of other competing policies. Thus there are situations where overtime bans, work to rule campaigns, honouring picket lines, *et cetera* should not constitute "strikes" as a matter of policy, but would do so under the definitions as literally construed. Although there is the safeguard of denial of discretionary relief in the "unfair" cases, this is not satisfactory and the "strike" definition should exclude such instances as a matter of substance.

In contrast, the subjective component in the definitions of other provinces can be applied more flexibly to accommodate the competing policies in the legislation. So far this has only occurred in British Columbia. Elsewhere, the indications are that the word "includes" will expand the definition to bring it into line with that of the objective component jurisdictions. It is suggested that this would be unfortunate. Rather, the definitions in the latter jurisdictions at least should be amended so as either to incorporate an active subjective component or otherwise to infuse a "mischief" element into the definitions.

Secondly, it is submitted that the legislative scheme should be fundamentally readjusted so as to allow the parties wider freedom to resort to sanctions over disputes of interest during the lifetime of the collective agreement. It is suggested that the peace obligation be

bargainable in the sense that the parties should start with a presumed right to serve notice to bargain on any issue at any time, save in respect to any negotiated peace obligation which they have agreed upon. This approach recognizes that industrial relations operate in a dynamic environment and supposes that the pre-eminent advantage of collective bargaining is its potential for maximizing the scope of bilateral job regulation rather than the maximization of "peace at any price".