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Replacement Players for the Toronto Blue Jays?: Striking the Appropriate Balance Between Replacement Worker Law in Ontario, Canada and the United States

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REPLACEMENT PLAYERS FOR THE TORONTO BLUE
JAYS?: STRIKING THE APPROPRIATE BALANCE
BETWEEN REPLACEMENT WORKER LAW
IN ONTARIO, CANADA AND
THE UNITED STATES

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INTRODUCTION

For sports fans, August 12, 1994, will be infamously remembered as the day when all 1120 members of the Major League Baseball Players' Association¹ ("Players' Association" or "Players") went on strike,² launching what became the longest work stoppage in the history of professional sports.³ One month later, on September 14, the owners of the twenty-eight Major League Baseball teams ("Owners") cancelled the World Series⁴ for the first time since 1904.⁵ Furthermore, as a result of the strike, the Players have forfeited approximately US\$230 million in income,⁶ while the Owners have endured losses approaching US\$600 million.⁷ Thus, the Major League Baseball (or "MLB") labor dispute has generated more than US\$800 million in losses, without accounting for the financial damage levied upon interested third parties, such as the local communities that depend

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1. See Paul Waldie, *Scabs Set To Play Ball Next Year: Legal Eagles Say Owners Can Field Scabs in the Majors in '95 Season. Except in Toronto, Where Jays Are Protected by Ontario Labor Law*, FIN. POST, Dec. 1, 1994, § 1, at 10. There are twenty-eight teams in Major League Baseball, each with forty players on its official roster. *Id.* The Major League Baseball Players' Association is the union that represents Major League Baseball players. Frank Swoboda, *Labor of Glove; Baseball Players' Bargaining Clout Offers Clues to a Union Revival*, WASH. POST, July 24, 1994, at H1 [hereinafter *Labor of Glove*].

2. *Baseball '94: Going, Going . . . Gone*, L.A. TIMES, Sept. 15, 1994, at C7.

3. See *id.* The Players' Association ended the strike on March 31, 1995. Murray Chass, *Backed by Court, Baseball Players Call Strike Over*, N.Y. TIMES, Apr. 1, 1995, § 1, at 1; see Murray Chass, *Labor Board To Seek Injunction Against Baseball Club Owners*, N.Y. TIMES, Mar. 27, 1995, at A1 (hereinafter *Labor Board To Seek Injunction*) (discussing status of strike).

4. See AMERICAN HERITAGE DICTIONARY 1391 (2d college ed. 1982). The World Series is defined as the series of professional baseball games played each fall between the championship teams of the American League and the National League. *Id.*

5. *Baseball '94: Going, Going . . . Gone*, *supra* note 2, at C7.

6. Mark Maske, *Baseball's Waiting Game: Now Both Sides Cool off, Action Shifts to Camps, Hearings on Hill*, WASH. POST, Feb. 12, 1995, at D1 [hereinafter *Baseball's Waiting Game*].

7. *Id.*

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upon MLB for revenue and employment.⁸

Determined to reopen for business, the Owners collectively decided to hire replacement workers to play for their teams until the strike settled.⁹ In mid-January 1995, the Major League Baseball Executive Council¹⁰ approved the hiring of temporary replacement players.¹¹ Under U.S. labor law, the Owners were legally entitled to hire workers to replace the Players, who were engaged in an economic strike,¹² involving such issues as a Payroll Tax,¹³ Salary Arbitration,¹⁴ and Revenue

8. See Bob Chick, *Baseball Strike Has her Jobless and Frustrated*, TAMPA TRIB., Mar. 4, 1995, at 1 (discussing financial affects of strike on stadium vendors and support staff); Claire Smith, *Chilly Season for Spring Training Towns*, N.Y. TIMES, Mar. 23, 1995, at B19 (explaining impact of strike on cities dependent upon MLB for revenue). The city of Winter Haven, Florida, is expected to lose more than US\$250,000 because of the strike. *Id.*

9. Murray Chass, *Who Are Those Guys? Veil of Secrecy to Be Lifted Soon*, N.Y. TIMES, Feb. 12, 1995, § 8, at 1 [hereinafter *Who Are Those Guys?*].

10. Murray Chass, *Steinbrenner Gets a Seat on Owners' Ruling Unit*, N.Y. TIMES, Mar. 9, 1995, at B19. The Major League Baseball Executive Council operates Major League Baseball in the absence of a League commissioner. *Id.* The Council makes decisions regarding the day-to-day workings of MLB. *Id.* Currently, there is no Commissioner of MLB. *Id.* Bud Selig of the Milwaukee Brewers is Chairman of the eight-member Council, and consequently is functioning as the acting Commissioner. *Id.*

11. UK: *Baseball-Blue Jays Coaches Spared From Replacement Worries*, Textline-Reuter Sports, Jan. 19, 1995, available in LEXIS, Nexis Library, Curnews File. Temporary replacement workers fill the jobs of striking workers until the strike is over. George S. Roukis & Mamdouh I. Farid, *An Alternative Approach to the Permanent Striker Replacement Strategy*, 44 LAB. L.J. 80, 81-82 (1993).

12. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345 (1938). Employers who are the target of an economic strike, and who have not committed any acts prohibited by the National Labor Relations Act, may hire permanent replacement workers. *Id.* The U.S. Supreme Court distinguished between situations where employees strike because of an employer's Unfair Labor Practice under Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 159 (1988), and where employees strike because of economic issues and the employer is "guilty of no act denounced by the statute." *Id.*; NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 790 (1989).

13. *Baseball's Waiting Game*, *supra* note 6, at D1. The Owners' recently proposed that a 75% tax be levied on all money teams devote to player compensation above a threshold of US\$35 million. *Id.* The Owners also want a 100% tax on all money paid to players in excess of US\$42 million. *Id.* The Players' Association propose that only certain teams, under a revenue-sharing plan, pay a tax on their payroll. *Id.* The Players' plan calls for a five percent tax on all money clubs devote to player compensation in excess of 50% of the average major league payroll in a given year. *Id.* Furthermore, the Players want a ceiling of a 25% tax on all player compensation exceeding 160% of the average payroll. *Id.*

14. *Id.* The Owners want to eliminate salary arbitration. *Id.* The Players are willing to eliminate or modify arbitration, in exchange for other forms of compensation, such as increased free agency rights. *Id.*

Sharing.¹⁵

The inability of the Owners and Players to agree to a new collective bargaining agreement (or "CBA"),¹⁶ an agreement that would address such economic issues,¹⁷ prompted the Owners to escalate the labor dispute¹⁸ and hire temporary replacement players.¹⁹ The Owners, however, encountered an obstacle that could have prevented them from universally implementing their replacement player plan²⁰ — the Province of Ontario, home of the Toronto Blue Jays, forbids the hiring of replacement workers.²¹

This Note compares the doctrine of replacement workers as it exists in Ontario, Canada, the United States, and international law. Part I places the baseball strike in its proper historical context, recapitulating past labor disputes in Major League Baseball, as well as examining the principal areas of contention in the present conflict. Part I also introduces the structure and workings of the International Labour Organisation ("ILO") and explores the right to strike and the right to hire replacement workers during a strike under international labor law. Part II discusses the right to strike and the right to hire replacement

15. *Id.* The Owners and Players both approved a plan adopted by the Owners in January 1994. *Id.*

16. See ARCHIBALD COX ET AL., *CASES AND MATERIALS ON LABOR LAW* 740 (11th ed. 1991). A collective bargaining agreement is a labor contract which establishes the relationship between the employer and employees, and among the employees themselves." *Id.* "The agreement is not a contract of employment; employees are hired separately and individually, but the tenure and terms of their employment once in the [bargaining] unit are regulated by the provisions in the collective bargaining agreement." *Id.*; see BLACK'S LAW DICTIONARY 263 (6th ed. 1990). A collective bargaining agreement is an agreement between an employer and a labor union that regulates terms and conditions of employment for all members of the bargaining unit that work for that employer. *Id.* The former CBA expired on December 31, 1993. *Baseball '94: Going, Going . . . Gone*, *supra* note 2, at C7.

17. *Baseball '94: Going, Going . . . Gone*, *supra* note 2, at C7.

18. 29 U.S.C. § 152(9) (1988). Section 2(9) of the NLRA defines a labor dispute as any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. *Id.*; *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344 (1938).

19. Waldie, *supra* note 1, § 1, at 10.

20. *Id.*

21. The Labour Relations Act, R.S.O., ch. 21, § 73.1 (1992) (Can.). An employer shall not use any person to perform the work of an employee who is on strike. *Id.* § 73.1(5).

workers in both Ontario and the United States. Part III analyzes the MLB strike under both Ontario and U.S. law. Part III further argues that Ontario law infringes on employers' rights, transcending the protections afforded employees by international law, regarding the use of replacement workers, and that U.S. law, under the *Mackay Doctrine*,²² unduly restricts workers' right of freedom of association. This Note concludes that a compromise between Ontario and U.S. law would result in a more balanced distribution of power between labor and management, thereby furthering the goals of the ILO, the Ontario Labor Relations Act (or "Ontario Act"), and the U.S. National Labor Relations Act (or "NLRA").

I. *THE BASEBALL LABOR DISPUTE, THE RIGHT TO STRIKE, AND THE RIGHT TO HIRE REPLACEMENT WORKERS UNDER THE INTERNATIONAL LABOUR ORGANISATION*

The Major League Baseball strike, involving teams in both Ontario, Canada and the United States, illustrates two antithetical approaches to the issue of replacement workers.²³ The ILO is an Organization comprised of workers', employers', and government representatives from its member states, that establishes international labor standards.²⁴ The ILO has addressed the issue of replacement workers, articulating a policy that differs from the practice in both Canada and the United States,²⁵ two of its member states.²⁶

A. *The Major League Baseball Labor Dispute*

One constant throughout the history of professional baseball²⁷ in the United States has been the controversy surrounding

22. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938) (stating that employer who has not committed unfair labor practice and is target of economic strike may hire permanent replacement workers).

23. See *id.* (establishing right to hire permanent replacement workers); The Labour Relations Act, R.S.O., ch. 21, §§ 73-73.1 (1992) (Can.) (prohibiting use of replacement workers).

24. N. VALTICOS, *INTERNATIONAL LABOUR LAW* 20, 42 (1979).

25. Complaint Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Case No. 1543, 74 INT'L LAB. OFF. OFF'L BULL. 15, 27 (CFA 278th Rep. 1991).

26. INTERNATIONAL LABOUR OFFICE, *LIST OF RATIFICATIONS BY CONVENTION AND BY COUNTRY* 229 (Dec. 31, 1993) [hereinafter *LIST OF RATIFICATIONS*].

27. See Geoffrey C. Ward & Ken Burns, *Game Time*, U.S. NEWS & WORLD REP., Aug.

how much team owners should compensate their players.²⁸ In 1881, Albert Spalding, an owner of a professional baseball team, proclaimed that every team would face bankruptcy if players' salaries were not brought under control.²⁹ In the late 1800's, the highest paid player in MLB earned US\$2500 a year.³⁰ One hundred and fourteen years later, MLB has developed into a US\$2 billion a year industry³¹ and the top player salary has risen to US\$6.3 million a year.³² Now, in 1995, team owners are once again forecasting financial ruin for themselves and the sport, allegedly due to escalating players' salaries.³³ The Players' Association, however, does not subscribe to the Owners' theory of impending doom, and consequently has refused to accede to the Owners' contractual demands,³⁴ prompting the eighth labor dispute in Major League Baseball during the last twenty-three years.³⁵

1. Labor Relations in Major League Baseball Prior to 1994

From 1972 through 1990, MLB endured seven separate work stoppages, all intrinsically linked to the issue of player compensation.³⁶ In 1973, the Owners locked out the Play-

29, 1994, at 60 (discussing history of baseball in United States, from 1845 through 1994).

28. Mark McGuire, *Baseball May Throw Fans A Curve; Another Work Stoppage Looms as Players Are Ready To Set a Strike Date*, *TIMES UNION*, July 28, 1994, at A1 [hereinafter *Baseball May Throw Curve*]; see Kevin E. Martens, *Fair or Foul? The Survival of Small-Market Teams in Major League Baseball*, 4 *MARQ. SPORTS L.J.* 323 (1994) (discussing economic condition of MLB).

29. *Baseball May Throw Curve*, *supra* note 28, at A1.

30. *Id.* Salaries rose throughout the twentieth century, with a top salary of US\$100,000 in 1947, US\$125,000 in 1971, US\$1,000,000 in 1980, and peaking in 1994 at US\$6,300,000. *Id.*

31. Larry Whiteside, *A Divisive Dilemma; Arbitration a Core Issue in Baseball's Labor Dispute*, *BOSTON GLOBE*, Aug. 16, 1994, at 51 [hereinafter *A Divisive Dilemma*].

32. *Baseball May Throw Curve*, *supra* note 28, at A1.

33. *A Divisive Dilemma*, *supra* note 31, at 51.

34. *Id.*; see Murray Chass, *Economist Hired by Union Disputes Owners' Loss Claims*, *N.Y. TIMES*, Aug. 25, 1994, at B9 (explaining that player compensation is not causing economic problems in baseball and that baseball is financially healthy) [hereinafter *Union Disputes Owners' Loss Claims*].

35. *Baseball; A Long Road to a Stalemate*, *N.Y. TIMES*, Sept. 15, 1994, at B12 [hereinafter *Long Road to Stalemate*].

36. *Id.* In 1972, the Players went on strike due to a dispute regarding pension and benefit plans. *Id.* In 1973 the Owners locked the Players out before a settlement was reached establishing salary arbitration. *Id.* The Owners again locked the Players out in 1976, after disagreeing about the implementation of free agency. *Id.* In 1980 and 1981, the Players went on strike, each time because of the Owners' demands for compensa-

ers,³⁷ eventually resulting in the creation of a system of salary arbitration.³⁸ Under this system, a player whose contract had expired could present his salary demands to an arbitrator, who would decide how much money that player would make for his next contract.³⁹ One year later, this right to arbitrate salaries and contracts yielded Major League Baseball's first free agent.⁴⁰

Jim "Catfish" Hunter, a pitcher with the Oakland Athletics ("Athletics"), possessed a contract that obligated team owner, Charlie O. Finley, to pay Hunter's insurance premium.⁴¹ In 1974, after Finley failed to pay the premium, an arbitrator declared Hunter a free agent, ruling that Finley had breached the contract.⁴² As a free agent, Hunter could sell his services to the highest bidder.⁴³ He eventually signed a multi-year contract with the New York Yankees for a total of US\$3.75 million, making him the highest paid player in Major League Baseball.⁴⁴

Two years later, following another lockout, the Owners and

tion regarding free agents. *Id.* The final two labor disputes, in 1985 when the Players went on strike, and in 1990 when the Owners locked out the Players, involved negotiations over new collective bargaining agreements. *Id.*

37. *American Shipbuilding Co. v. NLRB*, 280 U.S. 300 (1965). A legal lockout under the NLRA may occur as follows: after an impasse has been reached, whereby the two sides have been unable to reach an agreement through good-faith bargaining, the employer may temporarily layoff employees solely as a means of bringing economic pressure. *Id.*

38. *Long Road to Stalemate*, *supra* note 35, at B12.

39. *A Divisive Dilemma*, *supra* note 31, at 51; *Players Win Big with Method of Resolving Salary Disputes*, PR Newswire, Mar. 14, 1980, available in LEXIS, News Library, Arcnws File. Under this system, both the player and the owner would submit competing offers as to how much money the player should be paid. *Id.* The arbitrator would then choose between the two offers. *Id.* See Frederick N. Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS L.J. 183 (1994) (discussing pros and cons of salary arbitration in MLB). Without this arbitration system, "the parties would likely submit inflated (the player) and deflated (the owners) salary figures in anticipation of the arbitrator's averaging or compromising. Essentially, the salary arbitration's final offer component actually promotes reasonable salary offers, realistic bargaining posture, and good faith settlement." *Id.* at 191-92. Statistics also indicate that once a player files for salary arbitration, that player and his team mutually agree on a salary without ever having to go to arbitration. *Id.* at 192. Critics of MLB's salary arbitration system decry that it yields inflated "salaries beyond what would result in a free market." *Id.* at 193.

40. *Long Road to Stalemate*, *supra* note 35, at B12; DAVID NEMEC ET AL., PLAYERS OF COOPERSTOWN — BASEBALL'S HALL OF FAME 250 (1994).

41. NEMEC ET AL., *supra* note 40, at 250.

42. *Id.*

43. *Game Time*, *supra* note 27, at 60.

44. *Id.*; NEMEC ET AL., *supra* note 40, at 250.

Players formally agreed to a league-wide system of free agency.⁴⁵ Under the new agreement, every veteran player with more than six years of Major League service automatically became eligible for free agency, upon the expiration of his individual contract.⁴⁶ This free agency system greatly increased demand for Players' services, prompting bidding wars amongst the Owners and yielding higher wages for the Players.⁴⁷ The average MLB salary rose from US\$44,674 in 1975,⁴⁸ to US\$185,000 in 1980,⁴⁹ to the current high of US\$1,200,000 in 1994.⁵⁰

2. Baseball's Exemption From Federal Antitrust Laws

In 1922, the U.S. Supreme Court adjudicated a labor dispute between two rival professional baseball leagues, carving out an exemption from federal antitrust laws⁵¹ for baseball.⁵² The Court held that baseball games could not be classified as commerce, and thus the antitrust prohibitions could not apply to professional baseball.⁵³ Thirty-one years later, the Court reaffirmed baseball's antitrust exemption in a law suit brought by MLB players against the Owners.⁵⁴

In *Toolson v. N.Y. Yankees, Inc.*,⁵⁵ players alleged that the owners had established an illegal monopoly and restrained trade by conspiring not to hire each other's players.⁵⁶ In a one paragraph decision, the U.S. Supreme Court ruled against the play-

45. NEMEC ET AL., *supra* note 40, at 242.

46. *Id.*

47. Larry Whiteside, *Eighteen Years Later, It's a Free-for-All; Seitz' Epic Ruling Has Set the Stage for Confrontation*, BOSTON GLOBE, Sept. 22, 1994, at 71.

48. Richard Justice, *Baseball's Owners Reject New Offer; Players Could Set Strike Date Today*, WASH. POST, July 28, 1994, at D1 [hereinafter *Owners Reject New Offer*].

49. NEMEC ET AL., *supra* note 40, at 242.

50. Swoboda, *Labor of Glove*, *supra* note 1, at H1.

51. Sherman Act, 26 Stat. 209 (1890), *as amended*, 15 U.S.C. §§ 1-8 (Supp. II. 1990). The Act prohibits the following: every contract, action, or attempt to restrain trade or commerce that may be regulated by Congress; any attempt to monopolize, or the actual monopolizing of any part of trade or commerce that may be covered by the U.S. Congress' commerce powers. *Id.* §§ 1-3.

52. Federal Base Ball Club of Baltimore, Inc. v. Nat'l League of Professional Base Ball Clubs, 259 U.S. 200 (1922).

53. *Id.* at 209. The Court reasoned that exhibitions of baseball were primarily intrastate affairs and that interstate travel amongst the teams was incidental to the exhibitions. *Id.*

54. *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953) (Burton & Reed, JJ., dissenting).

55. 346 U.S. 356 (1953).

56. *Id.* at 362-64. All players' contracts contained what was known as a "Reserve

ers, adhering to its earlier decision in *Federal Base Ball Club of Baltimore, Inc., v. National League of Professional Base Ball Clubs*.⁵⁷ The Court found that the U.S. Congress did not intend to subject baseball to the antitrust laws, and that only the legislature, and not the courts, could render baseball susceptible to the Sherman Act.⁵⁸

The U.S. Supreme Court revisited Major League Baseball's antitrust exemption for perhaps a final time in 1972,⁵⁹ in *Flood v. Kuhn*,⁶⁰ holding that only the U.S. Congress could repeal the exemption.⁶¹ To date, Congress has not revoked MLB's antitrust exemption.⁶² Notably, baseball is the only organized professional sport in the United States that is exempt from federal antitrust laws.⁶³

Fifteen years later, allegations of antitrust violations were at the core of a dispute between the Players and Owners.⁶⁴ In September, 1987, an arbitrator ruled on the first of three collusion grievances that the Players' Association had filed against the Owners.⁶⁵ The initial complaint alleged that following the 1985 baseball season, the Owners had conspired to not sign free agents.⁶⁶ The Owners, however, could not defend on the grounds of baseball's antitrust exemption, as they had explicitly agreed in the collective bargaining agreement with the Players'

Clause," a provision granting exclusive and perpetual rights to that player's services, to the team that first signed that player to a contract. *Id.*

57. *Id.* at 356-57.

58. *Id.* Two Justices dissented in the case, pointing out what they perceived as the inescapable truth that professional baseball was indeed in interstate commerce, and thus subject to federal regulations. *Id.* at 357-58.

59. See Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209, 221 (1983) (reviewing history of baseball's exemption and concluding that Supreme Court is unlikely to review exemption in near future).

60. 407 U.S. 258 (1972) (Douglas, Marshall, & Brennan, JJ., dissenting).

61. *Flood*, 407 U.S. at 285. "[T]he remedy if any is indicated, is for congressional, and not judicial action." *Id.* Three Justices dissented, agreeing that the Court's decision in *Federal Base Ball Club of Baltimore* was found to be "a derelict in the stream of the law that we, its creator, should remove." *Id.* at 258, 286.

62. Mark Maske & Frank Swoboda, *Congress to Receive Antitrust Bill; Legislation Would Limit Not Repeal, Baseball's 73-Year Old Exemption*, WASH. POST, Feb. 11, 1995, at B1 (discussing exemption and proposed legislation to modify it).

63. Mark Lacter, *Why Don't Baseball's Owners and Players Learn To Play Nice*, TAMPA TRIB., Feb. 18, 1995, at 17.

64. *Long Road to Stalemate*, *supra* note 35, at B12.

65. *Id.*

66. *Id.*

not to engage in such restraints of trade.⁶⁷ The arbitrator subsequently ruled in favor of the Players' Association,⁶⁸ prompting the Owners, who were fearful of two additional adverse rulings, to settle all three grievances for a total of US\$280 million in damages.⁶⁹ The settlement amount represented what the Owners would have paid the Players had they not colluded.⁷⁰

While the antitrust exemption did not affect the collusion disputes, the Players' Association believes that the exemption is playing a significant role in the current labor dispute.⁷¹ In an attempt to secure a new collective bargaining agreement, the Owners proposed that MLB establish a salary cap (or "cap"), a pre-set spending limit on Players' salaries.⁷² Ordinarily, under the federal antitrust laws, owners who conspire to or in fact implement a cap on salaries throughout an industry are guilty of price fixing, an illegal restraint of trade.⁷³ If Major League Baseball was subject to the antitrust laws, the Players' Association would be able to challenge in federal court any unilateral implementation of a salary cap by the Owners.⁷⁴ Furthermore, the Players have to end the strike if the U.S. Congress repealed the exemption.⁷⁵

67. *Id.*

68. *Id.* The Owners agreed to pay the damages on December 21, 1990. *Id.*

69. Alan Truex, *Hook or Crook, Owners Cling to Anti-Trust Exemption*, HOUS. CHRON., Mar. 5, 1995, at 3.

70. *Id.*

71. *Narrow Repeal of Baseball's Antitrust Exemption Would End Strike, Union Says*, 183 Daily Lab. Rep. (BNA) at D-18 (1994) [hereinafter *Narrow Repeal*].

72. *Long Road to Stalemate*, *supra* note 35, at B12.

73. 15 U.S.C. §§ 1-3; Andrew C. Miller, *Senate Scolds Adversaries; Owners, Players Take Beating During Hearing on Antitrust Exemption*, KAN. CITY STAR, Feb. 16, 1995, at D1 [hereinafter *Senate Scolds Adversaries*].

74. *Senate Scolds Adversaries*, *supra* note 73, at D1.

With the exemption in place, if the owners declare the negotiations at an impasse and impose a salary cap, the union has no recourse to challenge the terms as unreasonable restraints of trade under the antitrust laws nor does the union have the right to injunctive relief while the antitrust challenge is pending.

Narrow Repeal, *supra* note 71, at D-18.

75. *Narrow Repeal*, *supra* note 71, at D-18. As of the writing of this Note, a bill to limit MLB's antitrust exemption was pending before the U.S. Senate Judiciary Committee. *Senate Subcommittee Approves Bill To Lift Baseball Antitrust Exemption*, 66 Daily Lab. Rep. (BNA) at D-8 (Apr. 6, 1995). The U.S. Senate Judiciary Subcommittee on Antitrust, Monopolies, and Business Rights voted unanimously in favor of the bill, which would allow players to sue team owners for antitrust violations in labor negotiations. *Id.* The full U.S. Senate Judiciary Committee will consider the bill in May 1995. *Id.* If the

Currently, under the exemption, once negotiations deteriorate to the point that the parties are unable to make any progress, the Owners may declare an impasse and legally implement their proposed salary cap with or without the approval of the Players' Association.⁷⁶ While the Owners have firmly defended the antitrust exemption,⁷⁷ a recent decision handed down by the U.S. Court of Appeals for the D.C. Circuit may have rendered the issue moot.⁷⁸

Ruling on an appeal brought by the team owners of the National Football League ("NFL"), the D.C. Circuit held that a non-statutory exemption, created by the courts, shields employers from antitrust suits in certain circumstances.⁷⁹ The protections of this non-statutory exemption take effect when an employer imposes restraints on competition through the context of the collective bargaining process, after having bargained in good faith to impasse.⁸⁰ Under this ruling, the twenty-eight MLB

Judiciary Committee approves the bill, then the U.S. Congress will have the opportunity to vote it into law. *Id.*

76. Mark Maske, *Baseball's Labor Talks Collapse; Team Owners Install Salary Cap System; Litigation Looms*, WASH. POST, Dec. 23, 1994, at A1 [hereinafter *Baseball's Labor Talks Collapse*].

77. *Narrow Repeal*, *supra* note 71, at D-18.

78. See *Brown v. Pro Football, Inc.*, No. CIV.A.90-01071, 1995 WL 115729 (D.C. Cir. Mar. 21, 1995) (Wald, J., dissenting) (holding that in context of collective bargaining, antitrust laws do not apply). In *Brown*, nine players sued the NFL after the team owners unilaterally imposed a fixed salary for players on a practice squad. *Id.* The owners' action occurred after labor negotiations had stalled, reaching an impasse. *Id.* The District Court for the District of Columbia ruled in favor of the players, finding that the owners violated the Sherman Antitrust Act, by engaging in illegal price-fixing and restraint of trade. *Id.* The District Court awarded the players US\$30,349,642 in damages. *Id.*

79. *Id.* at *2.

Restraints on competition lawfully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining relationship. Thus, employees confronted with actions imposed lawfully through the collective bargaining process must respond not with a lawsuit brought under the Sherman Act, but rather with the weapons provided by the Federal labor laws.

Id.

80. *Id.*; see Kiernan M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1053 (1994) (discussing the non-statutory labor exemption in professional sports). A majority of courts follow a three-pronged test set forth by the Eighth Circuit in *Mackey v. National Football League*, 543 F.2d. 606 (8th Cir. 1976), "to decide labor exemption issues in player restraint cases." *Id.* For the exemption to apply:

First, the labor policy favoring collective bargaining may potentially be given

Owners could unilaterally implement a salary cap, an industry wide price-fixing mechanism, provided that they first bargain to impasse with the Players' Association.⁸¹

3. The Owner's Bargaining Position in the Current Dispute

For the 1994 baseball season, the Owners were scheduled to pay the Players' approximately US\$1.004 billion, an amount equal to fifty-eight percent of the total revenues for MLB.⁸² This amount marked a sharp increase from 1984, when the Players collectively earned US\$240 million, or forty percent of MLB's total revenues.⁸³ The Owners, who believed that the escalating Players' salaries would result in financial chaos for themselves and MLB,⁸⁴ unanimously agreed on June 8, 1994, to insist on the implementation of a salary cap in any new collective bargaining agreement with the Players' Association.⁸⁵ In support of their bargaining position, the Owners alleged that nineteen of the twenty-eight teams were currently losing money,⁸⁶ and that a

pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of a bona fide arm's-length bargaining.

Mackey, 543 F.2d. at 614.

81. *See id.* The D.C. Circuit's decision, however, seems to be in conflict with the goals of the NLRA, to eliminate practices by employers that are destructive to collective bargaining and which augment the inequality in bargaining power between employers and employees. *See* 29 U.S.C. § 151 (1988) (discussing purpose of NLRA to eliminate inequality of bargaining power).

82. *Baseball May Throw Curve*, *supra* note 28, at A1.

83. E.M. Swift, *The Perfect Square; Union Chief Don Fehr May Be a Humorless Bookworm, but Major League Baseball Players Laugh All the Way to the Bank*, *SPORTS ILLUSTRATED*, Mar. 8, 1993, at 32.

84. *A Divisive Dilemma*, *supra* note 31, at 51.

85. Richard Justice, *Baseball Closer to a Strike; Owners Agree to Cap on Player Salaries*, *WASH. POST*, June 9, 1994, at D1 [hereinafter *Baseball Closer to a Strike*]. The Owners also agreed that a new CBA may only be ratified if at least 21 out of the 28 teams vote for it. *Id.*

86. Richard Justice, *Baseball's Survival of the Richest; Labor Dispute Puts Focus on Struggles of Small Markets*, *WASH. POST*, July 24, 1994, at D1 [hereinafter *Baseball's Survival of the Richest*]. The Pittsburgh Pirates are alleged to be losing US\$1,000,000 a month even though the team has reduced its payroll to US\$20,000,000. *Id.* The Owners believe that "[t]he Pittsburgh Pirates are a microcosm for all that is wrong with baseball," and that the teams in Montreal, Minnesota, Oakland, Seattle, San Diego, Milwaukee, and Houston are all in similar positions. *Id.*

growing disparity in team payrolls was eroding league competition.⁸⁷

The Owners grounded their concern over the league's competitive balance in the belief that small market teams⁸⁸ with limited financial resources cannot successfully compete against teams in larger markets,⁸⁹ which have significantly higher payrolls.⁹⁰ For example, the San Diego Padres ("Padres"), a small market team, have a team payroll of US\$15,500,000, while the Atlanta Braves ("Atlanta"), a large market team, maintain a payroll of US\$52,000,000.⁹¹ Consequently, a team in an economic position similar to that of the Padres cannot afford to re-sign its talented players once they become free agents, as the larger market teams possess the financial resources to outbid them.⁹² Lee MacPhail, the General Manager of the Minnesota Twins, insists that unless a salary cap is implemented, forcing every team to maintain a payroll in roughly the same economic neighborhood, as many as ten of the current MLB teams will soon go out of business.⁹³

4. The Players' Response to the Proposed Salary Cap

While the Owners proposed to overhaul the economic structure of MLB through the implementation of a salary cap system,⁹⁴ the Players' Association was initially only interested in maintaining the status quo.⁹⁵ The Players responded to the

87. *Owners Reject New Offer*, *supra* note 48, at D1.

88. *Baseball's Survival of Richest*, *supra* note 86, at D1. A small market team is considered to be one where "the fans don't come out in droves" to see the team play, and where the team does not receive a large amount of revenue from the contracts it has with the local television and radio stations. *Id.* One such example is the Montreal Expos, who despite having one of the best teams in all of MLB, average only 22,000 fans per game. *Id.* The Minnesota Twins are another small team, pulling in US\$20,000,000 a year in local broadcasting contracts. *Id.*

89. *Id.* The New York Yankees are a large market team, earning US\$50,000,000 a year from its contracts with the local television and radio stations. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* In 1991, the Minnesota Twins, a small market team, won the World Series. *Id.* The following year, the team could not afford to re-sign its star players, and consequently four key players for the Twins left for other teams, through free agency. *Id.*

93. *Id.* "You can't continue to have the payroll disparities we have today." *Id.* "The danger is that nine or ten markets across North America will wither and die because they don't have a viable chance." *Id.*

94. *Baseball Closer to a Strike*, *supra* note 85, at D1.

95. *Labor of Glove*, *supra* note 1, at H1.

Owners' proposal by asserting that they were intent on keeping the current free-market system.⁹⁶ The salary cap would inhibit players' salaries, restrict the ability of free agents to sell their services, and potentially result in arbitration awards that exceed the cap's monetary limit.⁹⁷ Consequently, the Players' Association rejected the salary cap, proposing that a new collective bargaining agreement contain only minor changes, such as an increase in MLB's minimum wage, from US\$109,000 a year to US\$200,000, and the elimination of certain restrictions on free agency and salary arbitration.⁹⁸

The Players also responded specifically to the Owners' asserted justifications for a salary cap, attempting to refute each of the Owners' claims. At the request of the Players' Association, Roger Noll,⁹⁹ an economist at Stanford University, examined the Owners' profit and loss projections.¹⁰⁰ According to Noll's report ("Noll Report"), the Owners vastly understated the financial performance of the twenty-eight teams, perhaps by as much as US\$140,000,000.¹⁰¹ The Noll Report concluded that player compensation was not responsible for any claimed financial troubles in MLB, and that baseball was economically healthy.¹⁰²

Noll's findings also discredited the Owners' assertion that nineteen teams were losing money.¹⁰³ According to the Noll Report, from 1991 to 1993, only four of the twenty-eight teams in

96. *Owners Reject New Offer*, *supra* note 48, at D1.

97. Tom Verducci, *In the Strike Zone; the Players, Dead Set Against the Owners' Demands for a Salary Cap, Are on the Brink of a Walkout that Could Jeopardize the World Series*, SPORTS ILLUSTRATED, Aug. 1, 1994, at 26.

98. *Labor of Glove*, *supra* note 1, at H1.

99. Murray Chass, *Baseball; Economist Hired by Union Disputes Owners' Loss Claims*, N.Y. TIMES, Aug. 25, 1994, at B9 [hereinafter *Economist Hired by Union*]. The Players' Association has previously employed Noll to analyze the Owners' financial data. *Id.* In 1985, during contract negotiations, Noll released his conclusions, which the Owners severely criticized. *Id.* In the end, however, Noll's analysis was recognized as a more accurate depiction of MLB's economic state. *Id.*

100. *Id.* The Owners supplied Noll with their own economic data, attempting to support their contention that MLB needs a cap. *Id.* This was the same financial data upon which the Owners' based their economic projections for MLB. *Id.*

101. *Id.*

102. *Id.* "[T]he claim of widespread financial disaster in the sport is pure fiction." *Id.* "Total player compensation in professional baseball, contrary to widespread belief, is not increasing faster than revenues and cannot reasonably be said to be causing a decline in the financial status of the sport." *Id.*

103. Mark Maske & Tracee Hamilton, *Players' Study Finds Owners Underestimated Profits*, WASH. POST, Aug. 24, 1994, at C1.

Major League Baseball actually incurred losses.¹⁰⁴ The report did acknowledge that every year a few teams actually lose money.¹⁰⁵ Noll, however, believed that MLB's current economic structure was not the cause of these losses, and that with the exception of two teams, Pittsburgh and Seattle, the rest of the league will continue to earn annual profits.¹⁰⁶ The report faulted such factors as inadequacies in the League's television contract,¹⁰⁷ creative bookkeeping,¹⁰⁸ and the Owners' excessive administrative expenditures,¹⁰⁹ for the financial difficulties that some of the teams may be experiencing.¹¹⁰

5. The Proposals and Counter-Proposals

The Owners' initial proposal to the Players' Association for a new collective bargaining agreement contained a salary cap, which would employ half of the league's revenue towards Players' salaries.¹¹¹ Under this plan, each team would be obligated to spend at least eighty-four percent of the league average payroll on Players' wages.¹¹² While team Owners could spend

104. *Economist Hired by Union*, *supra* note 99, at B9. Kansas City, Milwaukee, Pittsburgh, and San Francisco all had cash-flow losses during this period. *Id.*

105. *Id.*

106. *Id.* A few teams actually lose money each year, but none "are fated to be persistent losers in the present structure," except perhaps for Seattle and Pittsburgh. *Id.*

107. Phil Rogers, *Players Face Blame with Hardball Stance*, DALLAS MORNING NEWS, Sept. 12, 1994, at B6. MLB agreed to a partnership deal with the National Broadcasting Company, and the American Broadcasting Company, effectively quelling competitive bidding for baseball's broadcasting rights. *Id.* Consequently, MLB sustained a significant drop in broadcasting revenue. *Id.* While each team had earned about US\$14,000,000 a year from the previous television contract, the current contract pays the Owners about half of that amount. *Id.*

108. *Economist Hired by Union*, *supra* note 99, at B9. The Owners did not include in their financial statements the US\$190,000,000 that they received in expansion fees from two new teams. *Id.* The Owners employed a legal accounting method that permitted the omission of these funds. *Id.* Had these fees been included in the financial statements, six teams that reported losses would have reported profits. *Id.*

109. *Id.* Noll discussed two teams that reported virtually identical total revenues and player salaries. *Id.* Over a two year period, one of the teams reported losses while the other was profitable. *Id.* Noll discovered that the chief difference between the two clubs was that the one that reported losses spent nearly 50% more on general and administrative expenses. *Id.* Additionally, Noll found that the Philadelphia Phillies reported a loss in 1994 of US\$1,025,000, almost the exact amount by which the Phillies were planning to increase their administrative expenditures. *Id.*

110. *Id.*

111. *Baseball's Survival of Richest*, *supra* note 86, at D1.

112. *Id.*

money above the eighty-four percent level, they would be prohibited from spending any money above the cap, which was set at one-hundred and ten percent of the current average team payroll.¹¹³ The Players' Association formally rejected this proposal on July 18, 1994, approximately one month after the Owners first introduced it.¹¹⁴

Almost two months later, on September 8, 1994, the Players presented a plan to the Owners that included a modest salary control mechanism.¹¹⁵ The proposal called for teams to share with each other twenty-five percent of their gate receipts from each game, with a one and one-half percent tax levied on both the total revenues for MLB and the player payrolls for the league's sixteen highest revenue teams.¹¹⁶ The Owners rejected this proposal one day after receiving it.¹¹⁷

In mid-October, the parties agreed, at the request of U.S. President Bill Clinton, to allow former U.S. Labor Secretary William J. Usery to mediate the dispute.¹¹⁸ Despite Usery's expertise, the Owners and Players were unable to conclude an agreement, spending the ensuing six months rejecting numerous proposals.¹¹⁹ The parties were unable to resolve their primary point

113. *Id.* Based on the average league payroll in 1994, Owners would be able to spend anywhere between US\$25,200,000 and US\$33,000,000 on their players' salaries. *Id.*

114. *Long Road to Stalemate*, *supra* note 35, at B12.

115. *Id.*; Mark Maske, *Owners Reject Proposal; Union Rebuffed as Hope for Baseball Settlement Fades*, WASH. POST, Sept. 10, 1994, at G1 [hereinafter *Union Rebuffed*].

116. *Union Rebuffed*, *supra* note 115, at G1.

117. *Id.*

118. Mark Maske, *Ex-Labor Secretary Usery To Mediate Baseball Meetings*, WASH. POST, Oct. 15, 1994, at C1. Secretary of Labor, Robert Reich, called Usery "the nation's top mediator." *Id.* Usery served as national director of the Federal Mediation and Conciliation Service between 1973 and 1976. *Id.*

119. See Mark Maske, *Owners Eye Replacement Teams; If Strike Goes on, Substitutes Could Start '95 Season*, WASH. POST, Nov. 30, 1994, at B1 (discussing Owner proposal containing salary cap, eliminating salary arbitration and reducing free agency eligibility to four years of service); Mark Maske, *Players Disclose New Plan; Breakdown in Talks Could Be in Offing*, WASH. POST, Dec. 11, 1994, at D11 (outlining Players' proposal of having Owners share gate receipts, imposing five percent tax on team payrolls, and creating US\$60,000,000 industry growth fund, contributed to equally by both parties); *Owners Make New Proposal, Baseball Negotiations Resume*, WASH. POST, Feb. 2, 1995, at D1 (explaining Owners' plan to impose 75% tax on all money devoted to player compensation above US\$35,000,000 threshold); Mark Maske, *Baseball Talks Take Turn for Worse; Owners, Players Dismiss Each Other's Taxation System Proposals*, WASH. POST, Mar. 5, 1995, at D1 [hereinafter *Baseball Talks Take Turn for Worse*] (describing Players' plan to impose 25% tax on all money spent on player compensation above level of 133% of average league salary).

of contention, the Owners' desire to suppress Players' salaries.¹²⁰ Consequently, on March 1, 1995, the Owners' replacement players participated in their first pre-season game.¹²¹ With the start of the 1995 season only a few short weeks away,¹²² the labor negotiations stalled.¹²³

6. Unfair Labor Practice Charges During the Strike

In August 1994, the Owners failed to pay approximately US\$8 million to the Players' pension plan, as the collective bargaining agreement required.¹²⁴ The Owners' defended their refusal to pay by stating that their obligation to make the payment expired, as had the agreement.¹²⁵ The Players promptly retorted that the obligation still existed, and subsequently filed an unfair labor practice charge with the National Labor Relations Board¹²⁶ (or "NLRB" or "Board").¹²⁷ The NLRB, following an investigation, issued a complaint, the equivalent of an indictment, against the Owners for their failure to make the pension payment.¹²⁸

The Owners similarly filed an unfair labor practice charge against the Players.¹²⁹ The Owners alleged in their complaint

120. Mark Maske, *Payroll Tax Still Separates Sides; Baseball Union, Owners Talk Amicably, but Have Not Bridged Gap*, WASH. POST, Mar. 2, 1995, at C1.

121. *Id.*

122. *Baseball Talks Take Turn for Worse*, *supra* note 119, at D1. The 1995 season was scheduled to open on April 2, with replacement players. *Id.* On March 30, 1995, the Owners officially adopted a plan to open the baseball season with replacement players. *Baseball Owners Formally Adopt Plan To Play 1995 Season with Replacements*, 62 Daily Lab. Rep. (BNA) at D-20 (Mar. 31, 1995). Twenty-six owners voted in favor of the plan while two owners voted against it. *Id.*

123. *Baseball Talks Take Turn for Worse*, *supra* note 119, at D1.

124. *Owners Withhold Pension Payments*, UPI, Aug. 3, 1994, available in Westlaw, Papers Database.

125. *Id.* The pension plan provisions contained in the agreement expired on March 31, 1994. *Id.*

126. 29 U.S.C. § 153 (1988). The National Labor Relations Board consists of five members appointed by the President of the United States with the consent of the U.S. Senate. *Id.* Under Section 10 of the NLRA, the NLRB is empowered "to prevent any person from engaging in any unfair labor practice." *Id.* § 160(a). The NLRB has authority, upon issuance of a complaint charging a party with an unfair labor practice, to petition a U.S. district court for temporary injunctive relief. *Id.* § 160(j).

127. Mark Maske, *Union's Orza Scoffs at Friday Deadline*, WASH. POST, Sept. 7, 1994, at B3.

128. Thomas Boswell, *Owners' Monster About To Turn on them*, WASH. POST, Dec. 21, 1994, at F1.

129. Mark Maske, *Baseball Talks Remain at an Impasse; No Progress on Payroll Taxation System; Charge of Unfair Labor Practice Is Dismissed*, WASH. POST, Dec. 21, 1994, at F1.

that certain members of the Players' Association had uttered threatening remarks towards replacement players.¹³⁰ The Board, however, found no merit in the charge, and summarily dismissed it.¹³¹

Two days after the NLRB's dismissal of the Owners' charge, the Owners declared an impasse in the labor negotiations, and exercised their right to impose the last proposal they had offered, the salary cap.¹³² The Players Association immediately responded by filing another unfair labor practice charge with the NLRB, accusing the Owners of failing to bargain in good faith and thus illegally declaring an impasse.¹³³ The Players petitioned the NLRB to seek an injunction in federal district court to prevent the Owners from implementing the salary cap.¹³⁴ The Board investigated the charge and was once again prepared to issue a complaint against the Owners.¹³⁵ The Players, Owners, and NLRB agreed, however, that the Board would refrain from issuing a complaint, the Owners would withdraw their implementation of the salary cap, and all parties would return to the negotiating table.¹³⁶

Following six more weeks of failed negotiations, the Players filed another charge with the NLRB against the Owners for their alleged failure to bargain in good faith.¹³⁷ The Board subsequently issued another complaint against the Owners,¹³⁸ and scheduled a May 22, 1995, hearing for the Players and Owners before an administrative law judge ("ALJ").¹³⁹ The ALJ will determine if the Owners committed an unfair labor practice when

130. *Id.*

131. *Id.*

132. Mark Maske, *Baseball's Labor Talks Collapse; Team Owners Install Salary Cap System; Litigation Looms*, WASH. POST, Dec. 23, 1994, at A1.

133. Mark Maske, *Both Sides File Charges with the NLRB; Baseball Players, Owners Say Good Faith Lacking*, WASH. POST, Dec. 28, 1994, at C1.

134. *Id.*

135. *Owners Withdraw Salary Cap; Move Halts Complaint by Labor Relations Board*, WASH. POST, Feb. 4, 1995, at H1.

136. *Id.*

137. Mark Maske, *NLRB To File Complaint on Owners; Move Could Result in Baseball Players Ending Strike, but Owners May Counter with Lockout*, WASH. POST, Mar. 15, 1995, at F1.

138. Mark Maske, *Union Says No to Replacements' Stats*, WASH. POST, Mar. 16, 1995, at B1 [hereinafter *Union Says No*]. The Board charged the Owners with "unfair labor practices for unilaterally eliminating the salary arbitration system and anti-collusion protections for free agent players." *Id.*

139. *Id.*

they collectively decided not to sign any free agents and to eliminate the system of salary arbitration, thereby violating the anti-collusion terms contained in the now expired CBA.¹⁴⁰

In the mean time, the NLRB authorized its General Counsel¹⁴¹ to seek an injunction in federal court to force the Owners to rescind their unilateral changes of terms contained in the collective bargaining agreement.¹⁴² The General Counsel subsequently filed a petition¹⁴³ for such an injunction with Judge Sonia Sotomayor, federal district court judge for the Southern District of New York.¹⁴⁴ Judge Sotomayor held an expedited hearing on March 31, 1995, to determine if circumstances warranted the issuance of an injunction.¹⁴⁵ Prior to the hearing, the Players vowed to end the strike if they succeeded in obtaining an injunction, forcing the Owners to reinstate the former work-rules.¹⁴⁶ The Owners, however, threatened to lockout the Players if they tried to return to work before both parties had concluded an agreement.¹⁴⁷

Following oral arguments by representatives for the NLRB, the Players' Association, and the Owners, Judge Sotomayor held that the NLRB had reasonable cause to find that the Owners committed unfair labor practices and that a temporary injunc-

140. *Id.* As of the writing of this Note, the ALJ had not yet heard the merits of the case. See *id.* (discussing scheduled date of hearing).

141. 29 U.S.C. § 153(d) (1988). The General Counsel has final authority, on behalf of the Board, "in respect of the investigation of charges and issuance of complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law." *Id.*

142. *Labor Board To Seek Injunction*, *supra* note 3, at A1. "The injunction would force the club owners to restore certain elements of the expired collective bargaining agreement, including salary arbitration and competitive bidding for free agents." *Id.*

143. *Silverman v. Major League Baseball Player Relations Committee Inc.*, 95 Civ. 2054 (SS) (1995). The Petition alleges that the Owners violated Sections 8(a)(1) and 8(a)(5) of the NLRA by: "unilaterally eliminating, before an impasse had been reached, salary arbitration for certain reserve players, competitive bargaining for certain free agents, and the anti-collusion provision of the collective bargaining agreement, Article XX(F)." *Id.*

144. *Id.*

145. Dominic Bencivenga, *Baseball Strike Hearing Set for Friday*, N.Y.L.J., Mar. 28, 1995, at 1. The General Council will have to prove that there is "reasonable cause to believe" that an appellate court would uphold a potential NLRB finding that the Owners committed an unfair labor practice and that a temporary injunction would prevent irreparable injury to the Players. *Id.*

146. *Labor Board To Seek Action for Players; Owners May Impose Lockout If Strike Ends*, CHI. TRIB., Mar. 18, 1995, at N3.

147. *Id.*

tion was a proper remedy.¹⁴⁸ In so holding, Judge Sotomayor found that the Owners had unlawfully changed certain mandatory subjects of bargaining¹⁴⁹ when they unilaterally instituted a freeze on hiring free agents, and eliminated salary arbitration and the anti-collusion provision contained in the CBA.¹⁵⁰ Judge Sotomayor further found that the Owners' unilateral changes had disrupted the equality in bargaining power between the parties, and that the issuance of an injunction would restore the balance that existed prior to the Owners' illegal acts.¹⁵¹

148. *Silverman v. Major League Baseball Player Relations Committee Inc.*, 1995 WL 144799 (S.D.N.Y.). Judge Sotomayor concluded the following:

[T]he Board has reasonable cause to believe that the [O]wners have committed an unfair labor practice, and that an injunction is just and proper to avoid irreparable injury and to ensure that the [O]wners and Players continue bargaining in good faith, until the resolution of the disputes, or a genuine impasse untainted by the unfair labor practices, or the determination by the NLRB of the charges before it, whichever occurs earliest.

Id. at *1.

149. *Id.* at *5. The U.S. Supreme Court categorizes subjects for collective bargaining as either mandatory or permissive. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Mandatory subjects of bargaining are those which affect wages, hours, and other terms and conditions of employment, while permissive subjects are all other matters. *Id.*; *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).

The distinction between mandatory and permissive subjects of bargaining is crucial in labor disputes, because it determines to what extent one party may compel the other to bargain over a given proposal: mandatory subjects require the parties to bargain in good faith, whereas no such requirement adheres to permissive subjects.

Major League Baseball Player Relations Committee Inc., 1995 WL 144799 at *5. A party may not unilaterally change a mandatory subject of bargaining contained in an expired CBA, during the interim between agreements, without first reaching a good faith impasse. *Katz*, 369 U.S. at 746. Such a unilateral change is an unfair labor practice under Section 8(d) of the NLRA, violating the duty to bargain in good faith. 29 U.S.C. § 158(d).

150. *Major League Baseball Player Relations Committee Inc.*, 1995 WL 144799 at *7-9.

The owners can, if they successfully bargain, end the free agency and salary arbitration systems, exclude the anti-collusion provision, and create an entirely new system. What they cannot do is alter particular individual's wages until the system is changed by agreement or until the parties negotiate to impasse. . . . Having freely entered into the free agency and reserve systems in their Basic [Collective Bargaining] Agreement, the owners are bound to that system until they bargain in good faith to an impasse.

Id. at *9.

151. *Id.* at *11. Injunctive relief is proper to: "prevent irreparable injury to the party injured by the unfair labor practice; restore or preserve the status quo that existed prior to the violation; protect the Board's ability to issue a final remedy; or protect the public interest in the collective bargaining process." *Id.* at *7 (citations omitted). Judge Sotomayor found that an injunction was proper under all four of the requisite grounds. *Id.* at *11-13. "In a very real and immediate way, this strike has placed the entire

Consequently, an injunction was issued against the Owners, ordering them to reinstate the former work rules and to bargain in good faith with the Players Association until an agreement is concluded, or a true good faith impasse is reached.¹⁵²

7. The MLB Labor Dispute After the Injunction

Judge Sotomayor's ruling prompted the Players' Association to immediately end the strike and offer to return to work,¹⁵³ while the Owners responded by filing a petition, with the Court of Appeals for the Second Circuit, to stay the injunction.¹⁵⁴ A few days after the injunction was issued, a three-judge panel for the Second Circuit denied the Owners' request to stay the injunction, asserting that the NLRB and Judge Sotomayor had just cause to believe that the Owners had unilaterally and unlawfully changed certain mandatory terms of the collective bargaining agreement.¹⁵⁵ With no immediate relief from the injunction, and without a new collective bargaining agreement, the Owners accepted the Players' offer to return to work, officially ending the 234-day strike.¹⁵⁶

concept of collective bargaining on trial. It is critical, therefore, that the Board ensure that the spirit and letter of federal labor law be scrupulously followed." *Id.* at *11.

152. *Id.* at *13. The injunction prohibits the Owners from declaring an impasse without first demonstrating to the court that "despite a reasonable passage of time negotiating in good faith the full mandatory bargaining terms of the expired Basic Agreement," the parties have been unable to conclude a new agreement. *Id.* at 14.

153. Murray Chass, *Backed By Court, Baseball Players Call Strike Over*, N.Y. TIMES, Apr. 1, 1995, § 1, at 1.

154. John Herzfeld, *Judge Issues 10(j) Injunction Ordering Baseball Ownership To Restore Status Quo*, 63 Daily Lab. Rep. (BNA) at D-23 (Apr. 3, 1995).

155. John Herzfeld, *Appeals Panel Denies Bid for Stay of 10(j) Injunction in Baseball Case*, 65 Daily Lab. Rep. (BNA) at D-18 (Apr. 5, 1995). According to Chief Judge Jon O. Newman, "the law of this circuit is that under these facts, free agency is a mandatory topic." *Id.* Following the court's ruling, Fred Feinstein, the General Counsel for the NLRB, characterized the ruling as "another victory for the NLRB, for collective bargaining, and for baseball." *Id.* Feinstein opined that "the court has again recognized the need to appropriately enforce labor law so that collective bargaining can have a chance of succeeding." *Id.*

156. Murray Chass, *Baseball Owners Quit Fight; Opening Day Is Set for April 26*, N.Y. TIMES, Apr. 3, 1995, § 1, at 1. The Owners welcomed the Players back on April 2, 1995, what was originally supposed to be the season's opening day. *Id.* The Owners did not vote on whether to lockout the Players. *Id.* The Owners, however, have locked out MLB's umpires, who are seeking an increase in wages. Murray Chass, *Umpires Trying To Block Replacements in Toronto*, N.Y. TIMES, Apr. 22, 1995, at 36. MLB is scheduled to open its season on April 25, 1995. *Id.* MLB plans to use replacement umpires for all games until a settlement is reached with the locked-out umpires. *Id.* The Toronto Blue Jays' opening game is set for April 26, 1995, at their home stadium in Toronto. Murray

B. An Overview of the International Labour Organisation

The International Labour Organisation (or "Organisation" or "ILO") is a Specialized Agency of the United Nations¹⁵⁷ with universally recognized expertise and competence in labor matters.¹⁵⁸ Since its establishment in 1919, under the Treaty of Versailles,¹⁵⁹ the Organisation has dedicated its efforts towards the improvement of labor standards on an international level.¹⁶⁰ The Constitution of the ILO,¹⁶¹ together with an expanding body of case law, and the more than 170 Conventions¹⁶² and 175 Recommendations¹⁶³ promulgated by the Organisation,¹⁶⁴ comprise the principal source of international labor law.¹⁶⁵

Chass, *Umpires Hope Law Might Be on Their Side*, N.Y. TIMES, Apr. 24, 1995, at C3. The Ontario Labour Relations Board has scheduled a hearing for the morning of April 25, 1995, to hear arguments on whether the MLB may use replacement umpires in Toronto. *Id.* Ontario provincial law bans the use of replacement workers during a strike or lockout. *Id.*; The Labour Relations Act, R.S.O., ch. 21 § 73.1 (1992) (Can.). Representatives for MLB are expected to argue that the statutory ban is not applicable to them as they are not Ontario-based employers. *Umpires Hope Law Might Be on Their Side*, *supra*, at C3. As of the writing of this Note, the Ontario Labour Relations Board had not yet heard arguments as to whether MLB may use replacement umpires for the games in Toronto. *See id.* (discussing upcoming hearing regarding replacement umpires).

157. LAMMY BETTEN, *INTERNATIONAL LABOUR LAW, SELECTED ISSUES* 11 (1993). The ILO became a specialized agency of the United Nations in 1946. *Id.* Under the Charter of the United Nations, specialized agencies are established by intergovernmental agreement and have wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields. U.N. CHARTER art. 57.

158. Lance Compa, *Labor Rights and Labor Standards in International Trade*, 5 LAW & POL'Y INT'L BUS. 65 (1993).

159. The Treaty of Versailles, June 28, 1919, pt. XIII, 225 Consol. T.S. 188, 373, 2 MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967, at 1265, 1508 (Fred L. Israel ed., 1967).

160. VALTICOS, *supra* note 24, at 42.

161. CONST. OF THE INT'L LAB. ORG., Oct. 9, 1946, 62 Stat. 3490, 15 U.N.T.S. 40 [hereinafter ILO CONST.].

162. *Id.* art. 19(1), 62 Stat. at 3518, 15 U.N.T.S. at 68. "Conventions are instruments designed to create international legal obligations for the states which ratify them." VALTICOS, *supra* note 24, at 44.

163. ILO CONST. art. 19(1), 62 Stat. at 3518, 15 U.N.T.S. at 68. "Recommendations are not designed to create obligations but to provide guidelines for government action." VALTICOS, *supra* note 24, at 44.

164. Compa, *supra* note 158, at 165. From 1919 to 1994, the ILO adopted 175 Conventions and 182 Recommendations. N. VALTICOS & G. VON POTOBOSKY, *INTERNATIONAL LABOUR LAW* 49-50 (1994).

165. VALTICOS, *supra* note 24, at 27, 43.

1. The Structure and Organs of the ILO

The ILO is an international, intergovernmental organization¹⁶⁶ comprised of member states, which gain admission by formally accepting the obligations articulated in the Constitution of the ILO.¹⁶⁷ The Organisation employs a tripartite structure, consisting of representatives from governments, as well as from employers' and workers' organizations in the member countries.¹⁶⁸ This structure provides equal status for management, labor, and government representatives in the ILO, thereby advancing a partnership concept to achieve social peace.¹⁶⁹

The Organisation contains three primary organs:¹⁷⁰ the International Labour Conference¹⁷¹ ("ILC"), the International Labour Office¹⁷² ("Office"), and the Governing Body.¹⁷³ The ILC consists of delegations from all member states, comprised of two government delegates, one employers' and one workers' delegate.¹⁷⁴ The principal responsibility of the ILC is to frame and adopt Conventions and Recommendations at its annual meetings.¹⁷⁵ The Conference alone decides whether international circumstances warrant that a particular proposal should be voted upon in the form of a Recommendation or a binding Convention.¹⁷⁶

The International Labour Office is primarily responsible for the collection and publication of information regarding labor standards and abuses.¹⁷⁷ The Office further assists the governments of member states to frame laws and regulations that com-

166. *Id.* at 28.

167. *Id.* "[T]he ILO may also admit Members to the Organisation by a vote concurred in by two-thirds of the delegates attending the session, including two-thirds of the Government delegates present and voting." ILO CONST. art. 1(4), 62 Stat. at 3494, 15 U.N.T.S. at 44.

168. VALTICOS, *supra* note 24, at 27.

169. William R. Simpson, *The ILO and Tripartism: Some Reflections; Labor Standards Cooperation; International Labor Organization's 75th Anniversary*, MONTHLY LAB. REV., Sept. 1994, at 40-41.

170. ILO CONST. art. 2, 62 Stat. at 3494-96, 15 U.N.T.S. at 45-46.

171. VALTICOS, *supra* note 24, at 34; *see* ILO CONST. art. 2(a), 62 Stat. at 3496, 15 U.N.T.S. at 46 (creating International Labour Conference in ILO).

172. ILO CONST. art. 2(c), 62 Stat. at 3496, 15 U.N.T.S. at 46.

173. *Id.* art. 2(b), 62 Stat. at 3496, 15 U.N.T.S. at 46.

174. *Id.* art. 3(1), 62 Stat. at 3496, 15 U.N.T.S. at 46; VALTICOS, *supra* note 24, at 35.

175. ILO CONST. art. 19(1), 62 Stat. at 3518, 15 U.N.T.S. at 68; VALTICOS, *supra* note 24, at 34-35.

176. ILO CONST. art. 19(1), 62 Stat. at 3518, 15 U.N.T.S. at 68.

177. VALTICOS, *supra* note 24, at 37.

ply with Conference decisions and standards.¹⁷⁸ While the Office also prepares reports on issues addressed at the ILC,¹⁷⁹ perhaps its most important function is the examination of subjects that the Office will bring before the ILC, with a goal of concluding international labor Conventions.¹⁸⁰

Similar to the ILC, the Governing Body is a tripartite organ,¹⁸¹ consisting of twenty-eight government representatives, fourteen workers' and fourteen employers' representatives.¹⁸² Essential aspects of the Governing Body's duties include the appointment of various ILO committees and the adoption or rejection of reports prepared by these committees.¹⁸³ Two such committees created by the Governing Body are the influential Committee on Freedom of Association ("CFA"),¹⁸⁴ and the Committee of Experts on the Application of Conventions and Recommendations or ("Committee of Experts" or "Committee").¹⁸⁵

The CFA is also a tripartite body, composed of nine regular and nine substitute members selected from the governments, employers' and workers' groups of the Governing Body.¹⁸⁶ The primary responsibility of the CFA is to investigate and dispose of complaints brought to its attention¹⁸⁷ so as to safeguard the right to freedom of association.¹⁸⁸ Governments, employers' organiza-

178. ILO CONST. art. 10(2)(b), 62 Stat. at 3508, 15 U.N.T.S. at 58; VALTICOS, *supra* note 24, at 38.

179. ILO CONST. art. 10(1), (2)(b), 62 Stat. at 3506-08, 15 U.N.T.S. at 56-58.

180. *Id.* art. 10(1), 62 Stat. at 3506, 15 U.N.T.S. at 56.

181. *Id.* art. 7, 62 Stat. at 3500-04, 15 U.N.T.S. at 50-54.

182. *Id.* art. 7(2), 62 Stat. at 3502, 15 U.N.T.S. at 52; *ILO Body Questions U.S. Policy Regarding Permanent Replacement of Striking Workers*, 147 Daily Lab. Rep. (BNA) at A-6 (July 31, 1991) [hereinafter *ILO Body Questions U.S. Policy*].

183. ILO CONST. art. 14, 62 Stat. at 3514, 15 U.N.T.S. at 64; VALTICOS, *supra* note 24, at 36.

184. Procedure for the Preliminary Examination of Complaints Alleging Breaches of Freedom of Association, 34 INT'L LAB. OFF. OFF'L BULL. 208, 209-10 (1951) [hereinafter ILO 1951]; 219th Report of the Committee on Freedom of Association, 65 INT'L LAB. OFF. OFF'L BULL. 204 (1982); VALTICOS, *supra* note 24, at 36-37.

185. EBERE OSIEKE, CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOUR ORGANISATION 173 (1985).

186. RUTH BEN-ISRAEL, INTERNATIONAL LABOUR STANDARDS: THE CASE OF FREEDOM TO STRIKE 51 (1988).

187. *Id.* at 50-53. The CFA reviews a complaint based on the written charges filed by the complaining party, and the written response of the charged party. *Id.* Only in rare circumstances does the CFA hear oral arguments. *Id.* at 52-53.

188. *Id.* at 50-51. The CFA safeguards the right to freedom of association for the Governing Body. *Id.* at 50; ILO 1951, *supra* note 184, at 208.

tions, or workers' organizations may file complaints with the CFA.¹⁸⁹ Furthermore, complaints may be filed against a government that has not ratified the Conventions regarding Freedom of Association,¹⁹⁰ Conventions 87¹⁹¹ and 98.¹⁹² Since its creation in 1951, the CFA has developed an extensive body of case law regarding such issues as collective bargaining and the right to strike.¹⁹³ Working on behalf of the Governing Body, the CFA is recognized as the authoritative body to adjudicate issues regarding freedom of association.¹⁹⁴

The Committee of Experts typically consists of nineteen individual members, each appointed by the Governing Body to serve for an initial term of three years, with the possibility of serving for an additional three-year term.¹⁹⁵ The members are selected from around the world, and usually possess high creden-

189. BEN-ISRAEL, *supra* note 186, at 51.

190. *Id.* at 52.

191. ILO Convention No. 87, Freedom of Association and Protection of the Right to Organise (June 17, 1948) [hereinafter Convention 87], in INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS: 1919-1981, at 4 (1982) [hereinafter INT'L LABOUR CONVENTIONS & RECOMMENDATIONS]. Convention 87 came into force on July 4, 1950. *Id.* Article 2 provides that workers and employers shall have the right to establish and join organizations of their own choosing. *Id.* art. 2, at 4. Under Article 3, these organizations shall have the right "to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes." *Id.* art. 3(1), at 4. Government authorities must refrain from any interference that would restrict this right or impede the lawful exercise thereof. *Id.* art. 3(2), at 4. Additionally, under Article 8, the "law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention." *Id.* art. 8(2), at 5.

192. ILO Convention No. 98, Convention Concerning the Application of Principles of the Right to Organise and to Bargain Collectively (June 8, 1949) [hereinafter Convention 98], in INT'L LABOUR CONVENTIONS & RECOMMENDATIONS, *supra* note 191, at 7. This Convention came into force on July 18, 1951. *Id.* Article I states that "[w]orkers shall enjoy adequate protection against acts of anti-union discrimination in respect to their employment." *Id.* art. 1(1), at 7. Such protection is particularly directed at acts calculated to "cause the dismissal or otherwise prejudice a worker by reason of union membership or because of participation in union activities" during non-working hours. *Id.* art. 2(b), at 7. The Convention further provides in part that "[w]orkers' and employers organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration." *Id.* art. 2(1), at 7.

193. VALTICOS, *supra* note 24, at 61-62. The CFA has heard over 1000 cases since 1951 involving rights corresponding to freedom of association. *Id.*

194. BEN-ISRAEL, *supra* note 186, at 51. The CFA has become the "parent commission acting on behalf of the Governing Body of the ILO, to hear and dispose of complaints." *Id.*

195. OSIERE, *supra* note 185, at 173.

tials either in the social or legal fields.¹⁹⁶ The proceedings of the Committee of Experts are strictly confidential, so as to ensure the objectivity and impartiality of its members.¹⁹⁷

The primary functions of the Committee are to study and evaluate the reports submitted by the various member states of the ILO, regarding ratified and unratified Conventions, and to guide governments, where necessary, towards compliance with ILO standards.¹⁹⁸ The Committee also issues general surveys, reports that clarify the breadth of the ILO Conventions and Recommendations.¹⁹⁹ These surveys, which also explain how a government might implement a particular labor standard, draw international attention to member states that have failed to comply with ILO standards over a prolonged period.²⁰⁰

2. The Effect of the ILO Constitution

A basic premise underlying the ILO is that all member states are bound to adhere to the obligations expressed in its Constitution.²⁰¹ In 1944, the ILO amended its Constitution, incorporating the Declaration of Philadelphia,²⁰² which broadened the goals of the Organisation.²⁰³ Included among the revised aims of the ILO were numerous civil rights provisions, such as assertions against discrimination,²⁰⁴ the establishment of minimum wage levels,²⁰⁵ and designs for child welfare.²⁰⁶ Signifi-

196. *Id.*

197. *Id.* at 174. "In the discharge of its functions, the Committee of Experts is guided by the fundamental principles of independence, impartiality and objectivity" *Id.*

198. *Id.* at 173.

199. *Id.* at 174.

200. *Id.*

201. BEN-ISRAEL, *supra* note 186, at 68. "The principles enunciated in the Constitution are applicable to all the member states of the Organisation." *Id.*; see ILO CONST. art. 1(3), 62 Stat. at 3492, 15 U.N.T.S. at 42 (explaining that countries become member states by accepting ILO Constitutional obligations).

202. DECLARATION CONCERNING THE AIMS AND PURPOSES OF THE INTERNATIONAL LABOUR ORGANISATION, Oct. 9, 1946, 62 Stat. 3554, 15 U.N.T.S. 104 [hereinafter PHILADELPHIA DECLARATION].

203. BETTEN, *supra* note 157, at 12.

204. PHILADELPHIA DECLARATION art. II(a), 62 Stat. at 3556, 15 U.N.T.S. at 106. Article II(a) states that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." *Id.*

205. *Id.* art. III(d), 62 Stat. at 3558, 15 U.N.T.S. at 108.

206. *Id.* art. III(h), 62 Stat. at 3560, 15 U.N.T.S. at 110.

cantly, the Declaration reaffirmed that the Organisation is grounded in certain fundamental principles, one of which is the right to freedom of association.²⁰⁷ Under the Constitution, all member states are bound to adhere to the fundamental principles and aims of the Declaration, as adopted by the ILO.²⁰⁸ Consequently, since 1944, all member states have been bound by the principles of freedom of association, even if they have not ratified Conventions 87 and 98.²⁰⁹

3. Conventions and Recommendations of the ILO

Conventions and Recommendations provide additional sources of international labor law, constituting what may be described as the International Labour Code.²¹⁰ Conventions are designed to create international legal obligations for the states that ratify them.²¹¹ Each Convention has the effect of an international treaty,²¹² binding only those states that have ratified it.²¹³ While member states are under no affirmative obligation to ratify Conventions, all states are required to bring each Convention before their respective national legislative authority for

207. *Id.* art. I(b), 62 Stat. at 3554, 15 U.N.T.S. at 104. The "freedom of expression and of association are essential to sustained progress [in improving international labor standards]." *Id.*

208. ILO CONST. art. 1(3), (4), 62 Stat. at 3492-94, 15 U.N.T.S. at 42-44; BETTEN, *supra* note 157, at 13.

209. BETTEN, *supra* note 157, at 12-13; BEN-ISRAEL, *supra* note 186, at 67-68.

Accordingly, it was held that member States are bound to apply the basic principles which are secured within the ILO Constitution as is the case of the principle of freedom of association, even if they did not ratify the ILO Conventions which enunciated such an international labour standard in detail.

Id.

210. VALTICOS, *supra* note 24, at 46.

211. *Id.* at 44.

212. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevens 1179. According to the Statute, the following are sources of international law:

- (a) *international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;*
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilised nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id. art. 38, 59 Stat. at 1063, 3 Bevens at 1187 (emphasis added).

213. John Wood, *International Labour Organisation Conventions-Labour Code or Treaties?*, 40 INT'L & COMP. L.Q. 649, 656 (July 1991); VALTICOS, *supra* note 24, at 45; BEN-ISRAEL, *supra* note 186, at 64.

consideration within one year following its adoption by the ILC.²¹⁴

Once a member state has presented a particular Convention to the competent legislative authority, a report must be made to the International Labour Office regarding the disposition of the Convention.²¹⁵ If the relevant authority adopts, and thereby ratifies the Convention, then that state is bound to implement the various provisions contained therein.²¹⁶ A member state that is unable to obtain the consent necessary for ratification is obligated to periodically update the International Labour Office on the current position of the law and practice in regard to the Convention, and the reasons why that Convention has not yet been ratified.²¹⁷

Although Recommendations are not meant to be binding upon member states, they do serve as guidelines for government action.²¹⁸ Recommendations have often been employed to supplement the requirements set forth in a Convention.²¹⁹ The ILO has developed a common practice of adopting a Convention that outlines basic rules, and then adopting a Recommendation on the same subject, that further details exactly how governments might endeavor to implement the more rudimentary language of the Convention.²²⁰

With respect to ratifying Recommendations, member states must follow a procedure similar to that of Conventions.²²¹ States must bring a Recommendation before the competent legislative authority for approval and report back to the Office whether the Recommendation was in fact ratified.²²² As is the case with Conventions, if a Recommendation is not ratified, that member state must periodically apprise the International Labour Office of the

214. ILO CONST. art. 19(5), 62 Stat. at 3520-24, 15 U.N.T.S. at 70-72. The article allows member states to wait up to eighteen months, in exceptional circumstances, before bringing the Convention before the relevant legislative authority. *Id.*; BETTEN, *supra* note 157, at 24.

215. ILO CONST. art. 19(5)(c), 62 Stat. at 3522, 15 U.N.T.S. at 70-72.

216. *Id.* art. 19(5)(d), 62 Stat. at 3522, 15 U.N.T.S. at 72.

217. *Id.* art. 19(5)(e), 62 Stat. at 3522-24, 15 U.N.T.S. at 72.

218. VALTICOS, *supra* note 24, at 44.

219. VALTICOS & VON POTOWSKY, *supra* note 164, at 62. The ILO has supplemented almost 80 Conventions in this manner. *Id.*

220. *Id.*

221. ILO CONST. art. 19(6), 62 Stat. at 3524-26, 15 U.N.T.S. at 72-76; *cf. id.* art. 19(5), 62 Stat. at 3520-24, 15 U.N.T.S. at 70-72

222. *Id.*, 62 Stat. at 3524-26, 15 U.N.T.S. at 72-76.

status of the Recommendation, as it pertains to the laws of that state.²²³

4. The ILO and Federal Member States

A unique problem arises in regard to the ability of federal member states, whose jurisdiction over labor matters is subject to limitations, to ratify and enforce ILO Conventions.²²⁴ Where the authority to regulate labor is dispersed amongst numerous provinces or states, the power to give effect to ILO Conventions may rest to some extent, not with the federal government, but with the individual provincial or state governments.²²⁵ Consequently, a federal state that employs a decentralized legal system with respect to labor law is thus powerless to enforce a given Convention, effectively rendering any ratification vacuous.²²⁶

The state of Canada, a member of the ILO since 1919,²²⁷ is a prime example of a federal state unable to give full effect to Conventions.²²⁸ In 1935, Canada enacted legislation with respect to hours of work, minimum wages, and a weekly day of rest, in compliance with ILO Conventions.²²⁹ The Attorney General of Ontario, however, challenged the enactment of such legislation, charging that these actions by the Federal Canadian government were unconstitutional.²³⁰ The Privy Council of Canada held that all three bills were *ultra vires*, as the treaty obligations involved were not of national concern to Canada.²³¹ Consequently, the only way that ILO Conventions may gain the force of law throughout Canada is through both Federal and Provincial ratification and enforcement.²³²

223. *Id.* art. 19(6)(d), 62 Stat. at 3524-26, 15 U.N.T.S. at 74-76.

224. WILLIAM L. TAYLER, *FEDERAL STATES AND LABOR TREATIES* 90 (1935).

225. E. A. LANDY, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION, THIRTY YEARS OF I.L.O. EXPERIENCE* 109-10 (1966).

226. *Id.* at 108-10.

227. *LIST OF RATIFICATIONS*, *supra* note 26, at 229.

228. *INT'L LABOR LAW COMM. SECTION OF LABOR RELATIONS LAW, AM. BAR ASSOC., THE LABOR RELATIONS LAW OF CANADA* 20-22 (Richard M. Lyon et al. eds., 1977) [hereinafter *ILLC*].

229. *Id.* at 21.

230. *Attorney General of Canada v. Attorney General of Ontario; Reference re Three Labour Acts*, [1937] 1 D.L.R. 673 (P.C.).

231. *Id.* at 682.

232. *Id.*; ILO CONST. art. 19(7), 62 Stat. at 3526-30, 15 U.N.T.S. at 76-80. The Federal Canadian government has very limited powers to regulate labor relations. *Toronto Electric Commissioners v. Snider*, [1925] 2 D.L.R. 5 (Can.). The individual prov-

The drafters of the ILO Constitution recognized that certain federal states lacked the legal authority to ratify and implement Conventions.²³³ The U.S. delegates involved with the drafting of the ILO Constitution expressed concern that the United States would be powerless to ratify conventions, as labor legislation was a matter for the then forty-eight states.²³⁴ As many as ten other member states may have been in a position similar to that of the United States.²³⁵

In order to avoid this problem, the drafters specifically outlined the obligations of federal member states with respect to Conventions and Recommendations.²³⁶ Under Article 19 of the ILO Constitution, each federal state must present a given Convention or Recommendation to the governments of its various states or provinces and work with them towards achieving ratification and enactment of appropriate legislation.²³⁷ These federal states are also bound to periodically update the International Labour Office on the status of such Conventions and Recommendations, as well as on the state of the law and practice in regard to such Conventions and Recommendations.²³⁸

C. *The Right to Strike Under the International Labour Organisation*

Neither the ILO Constitution nor the numerous Conventions and Recommendations establish an affirmative right to strike.²³⁹ The only instance in which strike activity is mentioned by name is in the Recommendation concerning Voluntary Con-

inces consequently have the power to adopt or ignore ILO Conventions. *See id.* (discussing powers of provinces to regulate labor within their respective boundaries and limited powers of Dominion Parliament to regulate labor within non-federal areas).

233. TAYLER, *supra* note 224, at 63; ILO CONST. art. 19(7), 62 Stat. at 3526-30, 15 U.N.T.S. at 76-80.

234. TAYLER, *supra* note 224, at 40, 58. The U.S. government did not begin regulating labor relations on a national level until 1935, with the passage of the Wagner Act. 49 Stat. 449 (1935). The Wagner Act, together with the Taft-Hartley amendments of 1947, the Landrum-Griffin amendments of 1959, and the 1974 amendments, comprise the National Labor Relations Act. 29 U.S.C. §§ 151-69 (1988).

235. TAYLER, *supra* note 224, at 58.

236. ILO CONST. art. 19(7), 62 Stat. at 3526-30, 15 U.N.T.S. at 76-80. Federal states that possess the legal authority to regulate labor matters are bound by the same obligations as are those members that are not federal states. *Id.* art. 19(7)(a), 62 Stat. at 3526, 15 U.N.T.S. at 76.

237. *Id.* art. 19(7)(b)(i), (ii), 62 Stat. at 3526-28, 15 U.N.T.S. at 76-78.

238. *Id.* art. 19(7)(iii), (iv), (v), 62 Stat. at 3528-30, 15 U.N.T.S. at 78-80.

239. INT'L LABOUR CONVENTIONS & RECOMMENDATIONS, *supra* note 191, at 3; ILO CONST., 62 Stat. at 3490, 15 U.N.T.S. at 40; VALTICOS, *supra* note 24, at 85.

ciliation and Arbitration.²⁴⁰ This Recommendation states that if a dispute has been submitted to a conciliation procedure with the consent of both parties, neither strike nor lock-out activity should occur.²⁴¹ The Recommendation further states that this suggested prohibition should not be construed as limiting in any way the right to strike.²⁴² Despite the absence of explicit language in its legislative materials, the ILO has, through the CFA and the Committee of Experts, established in international law a fundamental right to strike.²⁴³

Since 1952, the CFA has continually held that the right to strike is an essential and necessary right of trade unions.²⁴⁴ According to the CFA, trade union activity will only fully develop when the right to strike is protected both in law and practice.²⁴⁵ Furthermore, under CFA case law, workers must be granted complete freedom in exercising the right to strike,²⁴⁶ a right that should only be restricted in exceptional circumstances, and for a limited duration.²⁴⁷

240. Recommendation No. 92, Voluntary Conciliation and Arbitration (1951), in INT'L LABOUR CONVENTIONS & RECOMMENDATIONS, *supra* note 191, at 207.

241. *Id.* ¶ 4, at 207.

242. *Id.* ¶ 7, at 207.

243. VALTICOS, *supra* note 24, at 85-86. The United Nations Covenant on Economic, Social and Cultural Rights also establishes the right to strike in international law, binding signatories to ensure the viability of the right. International Covenant on Economic, Social and Cultural Rights, Dec. 12, 1966, 993 U.N.T.S. 3, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). "The States Parties to the present Covenant undertake to ensure: . . . [t]he right to strike, provided that it is exercised in conformity with the laws of the particular country." *Id.* art. 8(1)(d), at 50, 993 U.N.T.S. at 7.

244. Complaint Presented by the World Federation of Trade Unions against the Government of the United Kingdom, Case No. 28, (Jamaica) (CFA 2d Rep. 1952), reprinted in SIXTH REPORT OF THE INTERNATIONAL LABOUR ORGANISATION TO THE UNITED NATIONS 167-237 (Geneva, ILO 1952).

245. Complaints Presented by the World Federation of Trade Unions, the World Confederation of Labour, the International Confederation of Free Trade Unions and Other Trade Union Organizations Against the Government of Argentina, Case No. 842, 65 INT'L LAB. OFF. OFF'L BULL. 204 (CFA 219th Rep. 1982). "[T]rade union activity can only develop fully and in complete freedom when the right to strike and the right to bargain collectively at the global level are recognised in law and in practice." *Id.* at 209.

246. *Id.* at 212.

247. *Id.* at 209. "The Committee has recognised that strikes may be restricted, and even prohibited, in the public service, essential services, or a key centre of a country's economy because — and to the extent that — a work stoppage may cause serious harm to the national community." Complaint Presented by the Canadian Labour Congress and the Canadian Association of University Teachers Against the Government of Canada, Case No. 893, 62 INT'L LAB. OFF. OFF'L BULL. 22, 28 (CFA 194th Rep. 1979).

The CFA has grounded its decisions that a fundamental right to strike exists under international law on a plain meaning interpretation of Articles 3 and 10 of Convention 87.²⁴⁸ Convention 87 grants workers the right to organize their activities and to formulate their programmes, free from any interference by the public authorities.²⁴⁹ Workers are also guaranteed the right to join trade union organizations whose purpose is to further and defend the interests of its members.²⁵⁰ Consequently, the ILO has, through the CFA, announced that workers possess an affirmative right to strike in defending and promoting their economic interests.²⁵¹

While the ILO recognizes and affirms a worker's right to strike, the Organisation does not believe that the right is an end in itself.²⁵² Rather, strike action should be understood as a last resort for workers' organizations in pursuing their economic goals.²⁵³ The Committee of Experts notes that while strikes may be expensive and disruptive for all parties involved, including the general public, they are an essential feature of industrial relations and the collective bargaining process.²⁵⁴

1. Permissible Restrictions on the Right to Strike

The Committee has emphasized that while the ability to

248. *Canada*, 62 INT'L LAB. OFF. OFF'L BULL. at 28.

Under Article 3 of Convention No. 87, trade union organisations — as organisations of workers furthering and defending their occupational interests (Article 10) — have the right to formulate their programmes and organise their activities. It is on the basis of the right which trade unions are thus recognised as possessing that the Committee has always considered the right to strike as a legitimate — and indeed essential — means by which workers may defend their organisational interests.

Id.

249. Convention 87, art. 3, *supra* note 191, at 4-5.

250. *Id.* art. 10, at 5.

251. Complaints Presented by the United Trade Unions of Casablanca (Moroccan Union of Labour) Against the Government of Morocco, Cases Nos. 992 & 1018, 65 INT'L LAB. OFF. OFF'L BULL. 17, 20 (CFA 214th Rep. 1982). "[T]he right to strike constitutes one of the essential means which workers and workers' organisations must have at their disposal in order to promote and defend their occupational interests." *Id.*

252. COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, REPORT ON FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING 61 (1994) [hereinafter COMMITTEE OF EXPERTS].

253. *Id.*

254. *Id.* "Strikes are expensive and disruptive for workers, employers and society and when they occur they are due to a failure in the process of fixing working conditions through collective bargaining which should remain the final objective." *Id.*

strike is a fundamental right, governments may restrict or condition the exercise of that right.²⁵⁵ Generally, complete prohibitions on strikes are permissible only in rare circumstances such as during a natural disaster or war.²⁵⁶ One area, however, in which the ILO has approved the use of a permanent ban is in what may be called essential services, those whose interruption would imperil the safety or health of society.²⁵⁷ Additionally, member states may prevent public servants from striking, if those servants exercise authority in the name of the state, or if a prolonged work stoppage would acutely affect the public.²⁵⁸

The Committee further recognizes the legitimacy of legislation that prohibits both strikes and lockouts during the life of a collective bargaining agreement.²⁵⁹ Laws permitting strike activity only as a means to facilitate the adoption of an initial agreement or its renewal are compatible with the ILO, providing that workers and employers are afforded access to some form of a conciliation system.²⁶⁰ Essentially, the Committee of Experts has concluded that a government may restrict the right to strike provided that the restrictions do not seriously impair the exercise of the right, and thus limit the means available to workers for furthering their interests.²⁶¹

D. *The Right to Hire Replacement Workers Under the International Labour Organisation*

Convention 98 secures a powerful check against over-reaching restrictions levied upon the right to strike,²⁶² prohibiting an

255. *Id.* at 67.

256. *Id.* During such a national crisis, the prohibition may only be implemented for a limited time and only to the extent necessary to overcome the situation. *Id.*

257. *Id.* at 70. "[T]he Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population." *Id.* The Committee believes that it is not possible to categorize exactly what services do or do not fall into this definition, due to unique and special circumstances that exist in the various member states. *Id.*

258. *Id.*

259. *Id.* at 73. One such example of legislation that prohibits strikes and lockouts during the life of a collective bargaining agreement is the Ontario Labour Relations Act. The Labour Relations Act, R.S.O., ch. 21, § 74(1) (1992) (Can.).

260. *Id.*

261. *Id.* at 66-67.

262. See INT'L LABOUR CONVENTIONS & RECOMMENDATIONS, *supra* note 191, at 7. Convention 98 forbids an employer from discriminating against employees for participating or engaging in union activities. *Id.*

employer from discriminating against employees who engage in union activities.²⁶³ The Committee on Freedom of Association has held that an employer's refusal to reinstate employees, who have exercised their right to strike, is a violation of Convention 98.²⁶⁴ Such a denial of reinstatement, following the conclusion of a lawful strike, amounts to unlawful anti-union discrimination.²⁶⁵

In July 1990, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") filed a complaint with the CFA against the U.S. government, alleging that U.S. law violated employees' rights to freedom of association, by allowing for the permanent replacement of workers engaged in a lawful economic strike.²⁶⁶ The AFL-CIO directly challenged the rule set forth in *Mackay Radio*,²⁶⁷ granting employers the right to hire replacements.²⁶⁸ Arguing that there is often no difference between discharge and the permanent replacement of strikers,²⁶⁹ the AFL-CIO emphasized that the effect of both is to leave the lawfully striking employee without a job.²⁷⁰

The U.S. government responded to the complaint, asserting that the replacement worker doctrine is a long-time component of U.S. labor law that balances the rights and interests of workers and employers.²⁷¹ The United States explained the legal distinction between permanently replaced workers and discharged

263. *Id.*; COMMITTEE ON FREEDOM OF ASSOCIATION, DIGEST OF DECISIONS AND PRINCIPLES 85 (1985).

264. COMMITTEE ON FREEDOM OF ASSOCIATION, *supra* note 263, at 7. When an employer dismisses unionists for engaging in a lawful strike, "the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against contrary to Article I of Convention No. 98." *Id.*

265. *Id.* "The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association." *Id.*

266. Complaint Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Case No. 1543, 74 INT'L LAB. OFF. OFF'L BULL. 15 (CFA 278th Rep. 1991). "The AFL-CIO alleges in substance that the United States labor law and jurisprudence allow for the permanent replacement of workers engaging in lawful economic strikes, which gives rise to violations of freedom of association, and of the rights to organise and collective bargaining." *Id.*

267. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

268. *United States*, 74 INT'L LAB. OFF. OFF'L BULL. at 15.

269. *Id.*

270. *Id.* at 16.

271. *Id.* at 18.

workers, stressing that the former remain employees under Section 2(3) of the NLRA, possessing preferential reinstatement rights if and when a position becomes available.²⁷² While acknowledging the importance of a worker's right to strike, the U.S. Government argued that employers' possess a countervailing right to maintain operations during a labor dispute.²⁷³ Accordingly, the United States opined that the lure of a permanent position is the only way a struck employer is able to recruit replacement workers and thereby maintain operations.²⁷⁴ The U.S. government, however, did not substantiate this claim with any data, reports, or other forms of proof.²⁷⁵

Prior to rendering a decision, the CFA reaffirmed that the right to strike is an essential means through which workers and their organizations may promote and defend their economic interests.²⁷⁶ The Committee concluded that U.S. law does not actually guarantee this basic right because a worker who legally exercises the right to strike may lawfully be permanently replaced.²⁷⁷ Consequently, the practice in the United States of

272. *Id.* at 20.

In the absence of a determination that the employer has engaged in an unfair labor practice (which converts the economic strike to an unfair labor practice strike), the employer is not required immediately to reinstate economic strikers at the conclusion of the strike. Even if replaced, under United States law, economic strikers retain their status as employees and are entitled to preferential reinstatement. Section 2(3) of the NLRA provides that the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any regular and substantially equivalent employment"

Id.

273. *United States*, 74 INT'L LAB. OFF. OFF'L BULL. at 24. "The most potent measure that workers have is the right to strike. Employers have the countervailing right to continue operations in spite of a strike." *Id.*

274. *Id.* at 21.

It is an economic fact that employers may not be able to continue operations during a strike unless they hire replacement workers. Moreover, workers with the requisite skills are often unwilling to take only a temporary job, or to cross a union picket line for less than an offer or permanent employment.

Id. "Employers, therefore, have a substantial business need for having the option to offer permanent positions to replacement workers." *Id.* at 24.

275. *Id.* at 18-25.

276. *Id.* at 27.

277. *Id.*

The Committee considers that this basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally. The Committee considers that,

permanently replacing lawfully striking employees entails a derogation of the right to strike that may affect the free exercise of trade union rights.²⁷⁸ The CFA urged the U.S. government to consider this derogation and the harmful effects that it may have upon workers exercising their right of freedom of association.²⁷⁹

At its 1991 annual meeting, the Governing Body of the ILO adopted the conclusions of the CFA, criticizing U.S. policy regarding the permanent replacement of workers.²⁸⁰ Three years later, at the Eighty-First Session of the International Labour Conference, the Committee of Experts reported that the right to strike may be devoid of content if lawfully striking workers cannot obtain their reinstatement once the strike ends.²⁸¹ The Committee concluded that the right to strike is critically demeaned when the law of the land sanctions an employer's decision to permanently replace striking workers.²⁸²

II. *LABOR'S RIGHT TO STRIKE AND MANAGEMENT'S RIGHT TO HIRE REPLACEMENT WORKERS UNDER THE LAWS OF ONTARIO, CANADA AND THE UNITED STATES*

Both Canada and the United States are federal states, countries containing numerous provinces²⁸³ or states, united under one central federal government.²⁸⁴ Significantly, under a fed-

if a strike is otherwise legal, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights.

Id. (emphasis added).

278. *Id.*

279. *Id.*

280. *ILO Body Questions U.S. Policy*, *supra* note 182, at A-6.

281. COMMITTEE OF EXPERTS, *supra* note 252, at 62.

282. *Id.* at 76-77.

A special problem arises when legislation or practice allows enterprises to recruit workers to replace their own employees on legal strike. The difficulty is even more serious if, under legislative provisions or case-law, strikers do not, as of right, find their job waiting for them at the end of the dispute. The Committee considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights.

Id. "Since the maintaining of the employment relationship is a normal consequence of recognition of the right to strike, its exercise should not result in workers being dismissed or discriminated against." *Id.* at 78.

283. See H.W. ARTHURS ET AL., *LABOUR LAW AND INDUSTRIAL RELATIONS IN CANADA* 23 (3d ed. 1988). Canada is a federal state, comprised of ten provinces and two territories. *Id.*

284. ILLC, *supra* note 228, at 17-27.

eral scheme, the states or provinces²⁸⁵ retain powers, separate and distinct from the federal government.²⁸⁶ In the field of labor law, this separation of powers is of much greater consequence in Canada, where approximately ninety percent of the nation's work force is regulated by the labor laws of the individual provinces.²⁸⁷ Conversely, through the U.S. Supreme Court decision in *NLRB v. Jones & Laughlin Steel Corp.*,²⁸⁸ only about ten percent of all U.S. workers are now covered by state labor law.²⁸⁹ Thus, while labor law in the United States is for the most part a federal issue, it is provincial law that primarily governs labor relations in Canada.²⁹⁰

A. *The Right to Strike in Ontario, Canada*

Under the British North America Act of 1867,²⁹¹ each province is vested with the powers to regulate local works, property, and civil rights in the province, and all affairs of a local or private nature.²⁹² Since the 1925 landmark case, *Toronto Electric Commissioners v. Snider*,²⁹³ the Canadian courts have held that the provinces have exclusive jurisdiction to regulate labor relations within their boundaries.²⁹⁴ The Federal Canadian government retains limited authority over labor relations, regulating the fed-

285. *Id.* at 19. The two Canadian territories, the Northwest territories and the Yukon Territory, fall under federal jurisdiction. *Id.* The 10 provinces that have their own set of labor laws are Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan. *Id.* at 112-19.

286. *Id.*

287. *Id.* at 18.

288. 301 U.S. 1 (1937). The Court held that the Congress has, through its commerce powers, the authority to regulate labor relations and enact a national scheme of labor law. *Id.* at 30-43. The Court further held that Congress may regulate activities that affect interstate commerce. *Id.* These regulatory powers derive from the Commerce Clause in the U.S. Constitution. *Id.* at 37; U.S. CONST. art. I, § 8.

289. ILLC, *supra* note 228, at 18.

290. *Id.* at 17-22.

291. British North America Act, 1867, 30 & 31 Vict. c. 3 (U.K.).

292. *Id.* §§ 92(10), (13), (16).

293. [1925] 2 D.L.R. 5 (Can.). At issue was the Industrial Disputes Investigation Act, which granted the Federal Canadian government the authority to regulate labor disputes throughout the Federal Territories and the Provinces. *Id.* at 6. The Privy Council held that the Act was *ultra vires*. *Id.* at 9. The Privy Council stated that "[w]hatever else may be the effect of this enactment, it is clear that it is one which could have been passed, so far as any Province is concerned, by the Provincial Legislature under the powers conferred by § 92 of the B.N.A. Act." *Id.* at 8.

294. ILLC, *supra* note 228, at 20.

eral territories, matters involving interprovincial and international transportation and communication, and other matters that are deemed to be for the general benefit of Canada or for the benefit of two or more of the provinces.²⁹⁵

Scholars have recognized the indeterminate juridical nature of the right to strike.²⁹⁶ The Ontario Labour Relations Act (or "Ontario Act") does not explicitly state that workers have the right to strike.²⁹⁷ A general right to strike, however, does exist.²⁹⁸ The legal right to strike derives from both the absence of common law decisions denying its existence,²⁹⁹ and from the implicit language in various sections of the Ontario Act, that delineate the boundaries of the right and the restrictions that may be levied upon it.³⁰⁰ For example, Section 1 of the Ontario Act defines various labor law terms of art, including "strike."³⁰¹ Sections 74 and 76 of the Ontario Act respectively articulate when an employee may go on strike,³⁰² and what constitutes an unlawful strike.³⁰³ Thus, despite the absence of affirmative statutory language, the right to strike is embedded in the Ontario Labour Relations Act.³⁰⁴

1. Unlawful Strikes Under Ontario Law

The Ontario Act imposes a general prohibition on strikes during the period in which a collective agreement³⁰⁵ is in af-

295. *Id.* at 19.

296. ARTHURS ET AL., *supra* note 283, at 256.

297. The Labour Relations Act, R.S.O., ch. 21 (1992) (Can.).

298. ARTHURS ET AL., *supra* note 283, at 257.

299. *Id.* at 256-57.

300. *Id.*; *see, e.g.*, R.S.O., ch. 21, §§ 1, 41(1.2)(a), 73.1 (1992) (Can.) (discussing when strike activity may or may not occur).

301. R.S.O., ch. 21, § 1 (1992). A strike includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output. *Id.*

302. *Id.* § 74.

303. *Id.* § 76.

304. *See, e.g., id.* §§ 1, 41(1.2)(a), 73.1 (discussing when strike activity may or may not occur).

305. *See id.* § 1. A collective agreement, analogous to the U.S. collective bargaining agreement, is defined as follows:

An agreement in writing between an employer or an employers' organization, on the one hand, and a trade union or council of trade unions that, represents employees of the employer, or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or con-

fect.³⁰⁶ Any employee who is bound by such an agreement and who partakes in a strike will have engaged in an unlawful strike.³⁰⁷ Additionally, no union shall call for, authorize, or threaten to call or authorize an unlawful strike, and no officer, agent, official, or council of a union shall encourage, support, or procure an unlawful strike.³⁰⁸ The law further provides that no employee shall threaten to engage in an unlawful strike.³⁰⁹

2. Legal Strikes Under Ontario Law

Where a collective agreement is not in operation, certain procedural requirements must be satisfied before an employee may engage in a lawful strike.³¹⁰ In furtherance of the Ontario Act's stated purposes, to promote harmonious labor relations, industrial stability, and the ongoing settlement of differences between employers and trade unions,³¹¹ all strike activity is proscribed until the Minister of Labour³¹² has appointed a conciliation officer or mediator.³¹³ Following such an appointment, the employees may lawfully strike seven days subsequent to the Minister releasing the report of the mediator or conciliation officer.³¹⁴ If, however, the Minister concludes that it would not be advisable to appoint a conciliation board, the employees may

ditions of employment or the rights, privileges or duties of the employer, employers' organization, the trade union or the employees, and includes a provincial agreement.

Id.

306. *Id.* § 74(1).

307. *Id.* The quid pro quo in the Ontario Act, for the prohibition against workers going on strike while a CBA is in effect is the additional prohibition that an employer not lock out the employees. *Id.* A lockout is defined as follows:

The closing of a place of employment, a suspension of work or an employer's refusal to continue to employ a number of employees, with a view to compel or induce the employees, or to aid another employer to compel or induce that employer's employees, to refrain from exercising any rights or privileges under this Act, or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the union, or the employees.

Id. § 1.

308. *Id.* § 76.

309. *Id.* § 74(3).

310. *Id.* § 74(2)-(6).

311. *Id.* § 2.1(3).

312. *Id.* § 74. The specific language of Section 74 refers only to "the Minister." *Id.* Section 1, however, states that Minister is to mean Minister of Labour. *Id.* § 1.

313. *Id.* § 74(2).

314. *Id.* § 74(2)(a).

strike fourteen days after receiving such notification from the Minister.³¹⁵

Once these procedural requirements have been met, all members of the relevant bargaining unit³¹⁶ must be afforded an opportunity to vote, either for or against the decision to strike.³¹⁷ In addition, a strike vote conducted by a union must be done by secret ballot, so as to ensure that each individual cannot be identified with his or her vote.³¹⁸ Lastly, the union must give sufficient notice of the scheduled vote so that all those eligible to vote have an ample opportunity to cast their ballots.³¹⁹

B. *The Right to Hire Replacement Workers in Ontario, Canada*

Included among the purposes of the Ontario Labour Relations Act are the promotion of harmonious labor relations and the encouragement of the collective bargaining process, so as to enhance the ability of employees to negotiate terms and conditions of employment with their employer.³²⁰ These purposes, coupled with the Ontario Act's conciliatory nature,³²¹ highlight a strong preference in the law for employers and workers to exhaust all other avenues of negotiation and dispute resolution before resorting to a strike or lockout.³²² Once, however, a union or group of employees fulfill the requisite statutory criteria and subsequently elect to exercise their right to strike, Ontario law guarantees that the right will not be vacuous, by proscribing the hiring of replacement workers.³²³

1. The Statutory Ban on Hiring Replacement Workers

Section 73 of the Ontario Act provides that no employer or person acting on behalf of an employer or employers' organization shall engage in strike-related misconduct or retain the serv-

315. *Id.* § 74(2)(b).

316. *Id.* § 1. A bargaining unit is a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them. *Id.*

317. *Id.* § 74(5).

318. *Id.* § 74(4).

319. *Id.* § 74(6).

320. *Id.* § 2(2).

321. *Id.* § 74.

322. *Id.*

323. *Id.* §§ 73-73.1.

ices of a professional strike breaker.³²⁴ A professional strike breaker is defined as one who is not involved in the relevant dispute and whose primary object is to interfere with the exercise of any right under the Ontario Act in anticipation of, or during, a lawful strike or lock-out.³²⁵ Similarly, strike related misconduct includes a course of conduct intended to interfere with, obstruct, or disrupt the exercise of a right contained in the Ontario Act in anticipation of, or during, a lawful strike.³²⁶

In 1983, the Ontario Labour Relations Board³²⁷ ("OLRB") decided *United Steelworkers of America v. Securicor Investigation & Security Ltd.*,³²⁸ a case that illustrates the targeted behavior that the Ontario Act proscribes.³²⁹ *Securicor* involved a third party security company that was not a party to the collective agreement.³³⁰ At the request of the struck employer, Securicor dispatched an agent to pose as a striking employee and incite violence and unlawful conduct.³³¹ The OLRB held this conduct to be unlawful and imposed damages upon the third party company.³³²

In 1992, Ontario's New Democratic Party ("NDP") government amended the Labour Relations Act,³³³ enacting Section 73.1, which proscribes the use of replacement workers during any lock-out or lawful strike.³³⁴ In accord with the conciliatory nature of the Ontario Act, a union must first abide by certain procedural requirements before an employer will be bound by

324. *Id.* § 73(1). The Ontario Act specifically states that "no person, employer, employers' organization or person acting on behalf of an employer or employers' organization shall engage in strike-related misconduct or retain the services of a professional strike breaker." *Id.*

325. *Id.* § 73(2).

326. *Id.*

327. *Id.* §§ 102-10. The OLRB has the power to adjudicate all matters relating to the certification or decertification of a union to represent a unit of employees, and to resolve any conflicts arising over a labor agreement. *Id.*

328. [1983] O.L.R.B. Rep. 720.

329. *Id.* at 749-54.

330. *Id.* at 721, 749-50.

331. *Id.* at 750-51.

332. *Id.* at 761-62.

333. Jerry Cook, *Bill 40 Puts the Brakes on Auto Sector; Ontario's Labor Law Reform*, CAN. MACH. & METALWORKING, Jan. 1993, at 28 [hereinafter *Bill 40 Puts the Brakes on Auto Sector*].

334. R.S.O., ch. 21, § 73.1 (1992). This section came into effect on January 1, 1993. *Bill 40 Puts the Brakes on Auto Sector*, *supra* note 333, at 28.

the prohibition.³³⁵ These requirements focus on the way in which a strike is authorized, mandating that: a) employees take a strike vote only after notice of a desire to bargain is given, or after bargaining has in fact begun;³³⁶ b) the strike vote be conducted by way of secret ballot, with ample opportunity to cast a ballot afforded to all those eligible;³³⁷ and c) at least sixty per cent of those voting authorize the strike.³³⁸

Once a bargaining unit goes on strike, in accordance with the above listed procedures, an employer may not utilize the services of an employee in that unit, even if that employee wants to work.³³⁹ The Ontario Act does permit employers to deploy managerial or confidential employees³⁴⁰ to perform work that is ordinarily conducted by those on strike.³⁴¹ Employers, however, may not hire persons,³⁴² nor may they transfer employees to a place of operations³⁴³ to perform the work of the bargaining unit that is on strike.³⁴⁴ Furthermore, if a managerial or confidential employee is performing the work of striking workers, the struck employer may not hire persons to perform the work normally engaged in by that managerial or confidential employee.³⁴⁵

2. Exceptions to the Ban on Replacement Workers

While Ontario law embodies a general prohibition against the use of strikebreakers and replacement workers,³⁴⁶ the law also recognizes that there are times when the benefits of a ban on replacement workers are outweighed by other fundamental

335. R.S.O., ch. 21, § 73.1(2) (1992).

336. *Id.* § 73.1(2.1).

337. *Id.* § 73.1(2.2).

338. *Id.* § 73.1(2.3).

339. *Id.* § 73.1(4).

340. *Id.* § 73.1(1)(a). A managerial employee is a person who exercises managerial functions; a confidential employee is a person employed in a confidential capacity in matters relating to labor relations. *Id.*

341. *Id.* § 73.1(6).

342. *Id.* § 73.1(5).

343. *Id.* § 73.1(1). Place of operations is defined as any place where employees in the bargaining unit who are on strike, or who are locked out, would ordinarily perform their work. *Id.*

344. *Id.* § 73.1(6).

345. *Id.* § 73.1(5).

346. *Id.* §§ 73-73.1.

concerns.³⁴⁷ Therefore, the Ontario Act allows an employer, who is the target of a lawful strike, to hire replacement workers to the extent necessary to provide certain health care-related and emergency services.³⁴⁸ Further protecting the welfare of the general public, employers may lawfully hire replacement workers to the extent that the employer needs them in order to prevent: a) danger to life, health, or safety; b) the destruction or serious deterioration of equipment or property; or c) grave environmental damage.³⁴⁹

Before replacement workers may be hired to perform the work described in Sections 73.2(2) and 73.2(3), the Ontario Act requires that the employer notify the union of the type of work to be performed and the number of workers needed to complete the job.³⁵⁰ In an emergency situation, an employer shall notify the union, at the earliest possible time, that circumstances necessitate the use of replacement workers.³⁵¹ Following notification, a union may allow the employer to use bargaining unit employees to perform the required work under Sections 73.2(2) and 73.2(3).³⁵² Each union has the option to consent to the use of striking workers to perform this emergency work.³⁵³ Employers, however, must adhere to the union's decision.³⁵⁴

3. The Legal Significance of Prohibiting Replacement Workers

A consequential by-product of Ontario's ban on the use of replacement workers is that striking workers are guaranteed their jobs once the strike ends,³⁵⁵ subject to a few narrow exceptions.³⁵⁶ In furtherance of the Ontario Act's purpose to promote

347. *Id.* § 73.2.

348. *Id.* § 73.2(2). The Ontario Act allow replacements to be used to provide the following services: the custody or detention of persons; residential care, for children who are in need of protection, or for persons with behavioral or emotional problems or with a physical, mental or developmental handicap; emergency shelter or crisis intervention services and emergency dispatch communications services, ambulance services, or a first aid clinic. *Id.*

349. *Id.* § 73.2(3).

350. *Id.* § 73.2(4).

351. *Id.* § 73.2(6).

352. *Id.* § 73.2(7).

353. *Id.*

354. *Id.* § 73.2(8).

355. *Id.* § 75(2).

356. *Id.* § 75.

effective, fair, and expeditious methods of dispute resolution,³⁵⁷ the parties are encouraged to agree to terms regarding the reinstatement of the striking employees.³⁵⁸ If, however, an agreement cannot be reached, the parties are bound to follow the guidelines set forth in the Ontario Act.³⁵⁹

Following the conclusion of a strike, each striking employee is entitled to his or her former position.³⁶⁰ If there are not enough positions available for all returning employees, the positions shall be filled as work becomes available.³⁶¹ The employer must initially look to the collective agreement for any provisions relating to the reinstatement of workers.³⁶² If the agreement contains recall provisions based on seniority, as determined when the strike began, then the employer shall recall workers accordingly.³⁶³ In the absence of such a provision, the employer shall reinstate workers according to their length of service, which is also to be determined as of the time the strike began.³⁶⁴

In general, employees who are either on strike or locked out are entitled to displace any persons who were performing the work of striking or locked-out employees during the labor dispute.³⁶⁵ A striking employee, however, is not entitled to displace another employee in the bargaining unit who performed work during the strike, pursuant to Section 73.2, and whose length of service is now greater.³⁶⁶ While this exception could potentially infringe on a striking worker's right to return to his or her job, it is only applicable if employees are being recalled under Section 75(4)(b).³⁶⁷

4. The Controversy Over the Statutory Ban on Replacement Workers

Prior to January 1, 1993, an employer could discharge and permanently replace workers that engaged in a strike for six

357. *Id.* § 2.1(4).

358. *Id.* § 75(1).

359. *Id.*

360. *Id.* § 75(2).

361. *Id.* § 75(4).

362. *Id.* § 75(4)(a).

363. *Id.*

364. *Id.* § 75(4)(b).

365. *Id.* § 75(3).

366. *Id.*

367. *Id.*

months or more.³⁶⁸ The former Ontario law guaranteed striking employees a limited right of reinstatement, which they could only exercise within the initial six months of the strike, if they tendered to their employer an unconditional offer to return to work.³⁶⁹ Once such an offer had been made, an employer could not deny reinstatement unless that employer had completely eliminated the positions that those workers previously occupied.³⁷⁰ If an employer had temporarily suspended or discontinued certain operations, that employer was obligated to offer positions to the former employees, once such operations were resumed.³⁷¹

In 1992, however, the NDP government amended Ontario's Labour Relations Act,³⁷² prohibiting the use of replacement workers.³⁷³ Ontario Labour Minister Bob Mackenzie stated that the new legislation would increase labor-management co-operation as well as improve productivity.³⁷⁴ Through the amendments, the NDP government hoped to encourage partnerships between employees and employers that would augment the Province's stability.³⁷⁵

Numerous business groups, however, were adamantly opposed to the legislation, believing that it granted unions a potent

368. *Bill 40 Puts the Brakes on Auto Sector*, *supra* note 333, at 28; R.S.O. ch. 228, § 73(1) (1980) (Can.).

Where an employee engaging in a lawful strike makes an unconditional application in writing to his employer within six months from the commencement of the lawful strike to return to work, the employer must, subject to § 73(2) of the Labour Relations Act, reinstate the employee in his former employment, on such terms as the employer and the employee may agree upon, and the employer in offering terms of employment shall not discriminate against the employee by reason of his exercising any rights under the Labour Relations Act.

Id.

369. R.S.O. ch. 228, § 73(1) (1980) (Can.).

370. *Id.* § 73(2).

371. *Id.* "[I]f the employer resumes such operations, the employer is to first reinstate those employees who have made an application under § 73(1) of the Labour Relations Act." *Id.*

372. *Bill 40 Puts The Brakes On Auto Sector*, *supra* note 333, at 28.

373. *Id.*

374. Leslie Papp, *Job Creator or Job Killer? Unions, Business at Opposite Ends on Effects of Planned Labor Reforms*, *TORONTO STAR*, Apr. 1, 1992, at A19 [hereinafter *Job Creator or Job Killer?*]. "If these proposals become law they will contribute significantly to the economic renewal of the province." *Id.*

375. Desmond Bill, *Business Says It's Fed Up' with Rae*, *TORONTO STAR*, Apr. 3, 1992, at A1 [hereinafter *Business Fed Up*].

and deleterious economic weapon.³⁷⁶ Consequently, these groups waged vigorous propaganda campaigns against the amendments.³⁷⁷ The Motor Vehicle Manufacturers Association argued that the ban on replacement workers would cripple the industry, costing upwards of C\$10,000,000.³⁷⁸ The Coalition to Keep Ontario Working, another pro-business lobby, spent C\$700,000 on advertisements, alleging that the proposed changes in the law, if enacted, would cost Ontario 295,000 jobs³⁷⁹ and drive away investors.³⁸⁰ The business alliance Project Economic Growth ("PEG"), comprised of such major corporations as IBM, General Motors, and Sears,³⁸¹ initiated a C\$1,000,000 campaign in an attempt to defeat the proposals.³⁸² PEG also hired the U.S.-based lobbyist Hill and Knowlton, the firm that orchestrated favorable public sentiment in the United States during the Gulf War against Iraq, to direct the campaign.³⁸³

During the first year in which the Ontario Act prohibited employers from hiring replacement workers, the Labour Ministry reported that strike activity declined more than forty percent as compared to the previous year.³⁸⁴ Contrary to what business leaders had espoused, the number of strikes in Ontario fell from 116 to 67, resulting in a net gain of over 350,000 work days.³⁸⁵ In addition, during the first three quarters of 1993 unions negoti-

376. Leslie Papp, *\$700,000 Campaign Attacks Labor Bill*, TORONTO STAR, Sept. 25, 1992, at A1 [hereinafter *\$700,000 Campaign*].

377. *Id.*

378. Rob Wilson, *The Week in Review: Feb. 3 - Feb. 7*, FIN. POST, Feb. 10, 1992, § 1, at 2.

379. *\$700,000 Campaign*, *supra* note 376, at A1. The campaign slogan was entitled "[k]ill the bill before it kills your job." *Id.* One of the advertisements stated the following: "[t]he NDP has a debt to pay to union bosses — and it's paying with your job." *Id.*

380. Leslie Papp, *Ban On Strikebreakers Paying off for Unions Warnings of Mass Job Losses Failed To Materialize*, TORONTO STAR, Dec. 19, 1993, at E11 [hereinafter *Ban Paying Off*].

381. Thomas Walkom, *Business Teams up To Fight Rae's Labor Reforms*, TORONTO STAR, Feb. 22, 1992, at D5. PepsiCo Inc., Ford, Chrysler, Imperial Oil, McDonald's, and Honda also contributed to this lobbying effort. *Id.*

382. *Id.* A separate business lobby, More Jobs Coalition, employed C\$200,000 in an effort to defeat the proposed legislation. *Id.*

383. *Id.* Another lobby ran a C\$150,000 campaign labelling Ontario's Premier Bob Rae "Buffalo Business Boosters Man of the Year for economic policies 'that are driving jobs and investment out of Ontario.'" Matt Maychak, *Group's Ads Take Satiric Jab at Premier*, TORONTO STAR, Mar. 17, 1992, at A10.

384. *Ban Paying off*, *supra* note 380, at E11.

385. *Id.* From January 1, 1992 through October 1992, Ontario suffered 525,030

ated an average wage increase of nine one-thousandths percent, a record low.³⁸⁶ Ontario also experienced a rise in unionization, with 739 applications for union certification submitted to the Ontario Labour Relations Board in 1993, an increase of twenty-four percent from 1992.³⁸⁷

While labor and business leaders argued over whether the figures for 1993 were a product of the changed law or of the recession,³⁸⁸ one discernible effect of the law was a rush for legal advice on the part of employers.³⁸⁹ In 1993, the Toronto office of Baker & McKenzie, a law firm, received numerous requests from Ontario businesses on how to handle labor relations under the new law.³⁹⁰ Baker & McKenzie advised businesses to make sure they treated their workers fairly, paid competitive wages, and offered a safe, non-discriminatory work environment.³⁹¹ Since January 1, 1993, five percent of all labor negotiations have resulted in strikes, the same rate as before the NDP government enacted the ban on replacements.³⁹²

C. *The Right to Strike in the United States*³⁹³

Subject to certain limitations, the National Labor Relations Act³⁹⁴ (or "NLRA" or "Act") grants employees the affirmative legal right to strike, regardless of whether a collective bargaining

lost person days. *Id.* During the same period in 1993, there were 164,670 lost person days in Ontario as a result of strike activity. *Id.*

386. *Id.*

387. *Id.* In 1992, there were 595 applications submitted by unions for certification. *Id.*

388. *Id.*

389. Leslie Papp, *Labor Reforms Create Jobs — for Lawyers Consultants Cash in as Business Leaders Scramble for Advice*, TORONTO STAR, Feb. 15, 1993, at A2.

390. *Id.* During the first month in which the ban on replacements was in effect, the firm received 22 new business clients, each seeking advice regarding the new law. *Id.*

391. *Id.* Specifically, the firm advised businesses to set up internal grievance procedures, inform workers of all company policies, and to consider giving workers some extra benefits, "some of which cost the employer little or nothing." *Id.*

392. Telephone Interview with Patti Hannigan, Policy Adviser, Ontario Ministry of Labour (Feb. 28, 1995).

393. 29 U.S.C. §§ 151-69 (1988). For the purposes of this Note, the right to strike and the right to hire replacement workers in the United States will only be discussed in relation to the National Labor Relations Act, which is the primary body of labor legislation. *Id.* This Note will not discuss the Railway Labor Act, which regulates labor relations involving common carriers. 45 U.S.C. §§ 151-88 (1988).

394. 29 U.S.C. §§ 151-69.

agreement is in force.³⁹⁵ Section 13 expressly states that nothing in the Act, except as specifically provided for, shall be construed so as either to interfere with, diminish, or impede in any way the right to strike.³⁹⁶ Employees are also guaranteed the right to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection.³⁹⁷ Thus, while neither the common law nor the U.S. Constitution confers the absolute right to strike,³⁹⁸ the U.S. Congress has established that workers in fact have such a right.³⁹⁹

Rooted in the legal sanctioning of peaceful work stoppages is the belief that the strike, or the fear of a strike, is the driving force behind the collective bargaining process.⁴⁰⁰ When labor negotiations reach a firm point of disagreement, both the employees' bargaining representative and the employer have to choose between a compromise or a strike.⁴⁰¹ According to Harvard University Professor of Law, Archibald Cox, collective bargaining works because eventually both sides conclude that the risks of losses through a strike are so great that compromise is cheaper than economic warfare.⁴⁰² While parties sometimes choose to risk the economic uncertainties of a strike, the dispute will eventually settle when at least one side is convinced that continuing the struggle will cost more than acceptance of the adversary's terms.⁴⁰³

1. Lawful Economic and Unfair Labor Practice Strikes

Under the NLRA, employees' strikes are either economic or unfair labor practice strikes.⁴⁰⁴ The cause of a strike determines its character.⁴⁰⁵ An unfair labor practice strike occurs where an employer's violation of the labor laws is a contributing cause of

395. *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (holding that employees may lawfully exert various forms of economic pressure including strike or threat thereof, while negotiating renewal terms of agreement).

396. 29 U.S.C. § 163.

397. *Id.* § 157.

398. *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926).

399. 29 U.S.C. §§ 151-69.

400. COX ET AL., *supra* note 16, at 486-87.

401. *Id.* at 487.

402. *Id.*

403. *Id.*

404. *General Indus. Employees Union v. NLRB*, 951 F.2d 1308, 1311 (D.C. Cir. 1991).

405. *Id.*

the strike.⁴⁰⁶ Economic strikes are those where the employees' sole purpose is to bring economic pressure to bear upon the employer in an attempt to secure certain concessions in a collective bargaining agreement.⁴⁰⁷

Additionally, the character of a strike may transform over time, if the actual causes of the strike change.⁴⁰⁸ Thus, a strike that starts out as an economic strike, but which is prolonged by the employer's subsequent unlawful conduct, is converted to an unfair labor practice strike.⁴⁰⁹ Similarly, an unfair labor practice strike may be converted to an economic strike where the illegal conduct has been remedied, but the employees choose to remain on strike for economic reasons.⁴¹⁰

To determine the character of a strike, the requisite causal connection must be established.⁴¹¹ The NLRB has consistently held that this requirement is not satisfied simply because a strike coincides in time with an employer's unfair labor practice or with the parties' contract negotiations.⁴¹² Rather, the objective and subjective evidence of the strikers' actual motivation, as determined by the totality of the circumstances, is dispositive.⁴¹³

2. Restrictions on the Right to Strike

The NLRA imposes upon an employee's right to strike certain time, place, and manner restrictions,⁴¹⁴ as well as a general prohibition on "wrongful purpose" strikes.⁴¹⁵ For example,

406. *Id.*

407. *Id.*

408. *Id.* at 1311-12.

409. *Id.*

410. *Id.* at 1312.

411. *Id.*

412. *Id.* "The Board has consistently held that '[t]he requirement of a causal connection is not satisfied merely because [an unfair labor practice and a strike] coincide in time.'" *Id.* "[A]n employer's unfair labor practices during an economic strike do not ipso facto convert it into an unfair labor practice strike." *Id.*

413. *Id.*

414. *See, e.g.*, 29 U.S.C. § 158(d). A party wishing to modify an already existing collective bargaining agreement must serve written notice upon the other party concerning the proposed modifications 60 days prior to the agreement's expiration date and refrain from resorting to strikes or lockouts. *Id.* Any employee who engages in a strike within any notice period specified in this subsection shall lose his status as an employee under Sections 8, 9, and 10 of the NLRA. *Id.* §§ 8(d)(1)-(4)

415. *Id.* § 158(b)(4). A union commits an unfair labor practice when its members engage in a strike or other concerted activity for the purpose of: a) forcing an employer to enter into an unlawful agreement; b) forcing any person to stop doing busi-

under Section 8(d)(4),⁴¹⁶ employees are prohibited from engaging in a strike during a statutorily mandated sixty day negotiating period, where one of the parties has properly notified the other of an intention to renew or modify the collective bargaining agreement.⁴¹⁷ As well, striking employees who engage in actual or threatened violence, at their place of employment, on the picket line, or at the homes of fellow workers, fall outside the protections of the NLRA.⁴¹⁸ Furthermore, employees are not protected from employer self-help when their conduct during a strike is so fundamentally contrary to the existence of the employment relationship that it may be accurately characterized as indefensible, reprehensible, or disloyal.⁴¹⁹ Thus, unlike Ontario Law, which limits an employee's right to strike to situations where no collective agreement is in force,⁴²⁰ the NLRA grants workers a broad right to strike.⁴²¹ The NLRA, however, does not protect an employee's right to strike from what has become the single most consequential restriction on the exercise of Section 7 rights — the right of employers to hire permanent replacement workers.⁴²²

ness with any other person (secondary strikes), or forcing an employer to recognize or bargain with a union which is not the certified representative of such employees; c) forcing an employer to recognize or bargain with a union where another labor organization has already been certified as the employees representative; or d) forcing an employer to assign particular work to employees in one labor organization rather than to another. *Id.*

416. *Id.* § 158(d).

417. *Id.*

418. COX ET AL., *supra* note 16, at 547, 549.

419. *Id.* at 546; see *NLRB v. Local 1229*, 346 U.S. 464, 476-77 (1953). In *Local 1229*, employees engaged in a labor dispute with their employer, Jefferson Standard Broadcasting Co. *Id.* at 476. The employees were peacefully picketing outside the company's place of operations. *Id.* In the course of picketing, a number of employees took it upon themselves to pass out thousands of handbills containing virulent attacks on the quality of the company's broadcasts. *Id.* These handbills did not refer to the union, the labor dispute, or the ongoing collective bargaining negotiations. *Id.* The Supreme Court held that such acts of disloyalty were as indefensible as acts of sabotage. *Id.* at 477.

420. R.S.O. ch. 21, § 74(1) (1992) (Can.).

421. See *supra* notes 394-414 and accompanying text (discussing right to strike under NLRA).

422. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (finding that employer not guilty of unfair labor practice may hire permanent replacement workers).

D. Replacement Worker Law in the United States

Antithetical to the Ontario Labour Relations Act, the NLRA is silent as to whether employers have the legal right to hire replacement workers during a strike.⁴²³ In the absence of a Congressional prohibition, the U.S. Supreme Court has intervened and affirmed the existence of an employer's right to hire replacement workers during a strike.⁴²⁴ Through a trilogy of landmark cases, *NLRB v. Mackay Radio & Telegraph Co.*,⁴²⁵ *NLRB v. Fleetwood Trailer Co., Inc.*,⁴²⁶ and *Mastro Plastics Corp. v. NLRB*,⁴²⁷ the U.S. Supreme Court has distinguished between economic strikes and unfair labor practice strikes, conferring upon employers and employees disparate rights and obligations, contingent upon the type of strike involved.

1. Replacement Law During an Economic Strike

For almost sixty years, U.S. Supreme Court dicta⁴²⁸ from *Mackay Radio* has driven the law regarding the use of replacement workers during an economic strike.⁴²⁹ The Court opined that an employer who is the subject of an economic strike, and who has not committed any unfair labor practices, may hire permanent replacement workers in order to maintain operations.⁴³⁰ Consequently, under *Mackay Radio*, once an employer hires permanent replacements, striking employees are stripped of their right to immediate reinstatement upon the strike's conclusion.⁴³¹

Mackay Radio involved a California corporation that was engaged in the business of transmitting and receiving telegraph and radio messages across the country and abroad.⁴³² Following numerous failed attempts to secure a collective bargaining

423. 29 U.S.C. §§ 151-69 (1988).

424. *Mackay Radio*, 304 U.S. at 345-46.

425. 304 U.S. 333 (1938).

426. 389 U.S. 375 (1967).

427. 350 U.S. 270 (1956).

428. See BLACK'S LAW DICTIONARY 454 (6th ed. 1990). Dicta is defined as expressions in a court's opinion that are not essential to the determination of the case at hand, and therefore not binding in subsequent cases as legal precedent. *Id.*

429. *Mackay Radio*, 304 U.S. at 345-46.

430. *Id.* at 345-46.

431. *Id.*

432. *Id.* at 336.

agreement, the unionized employees called a strike.⁴³³ In order to maintain operations, the employer brought in replacement workers, to whom he promised permanent positions.⁴³⁴ When the strike ended, shortly thereafter, five of the replacement workers chose to stay on, prompting the employer to reinstate all strikers except for the five most actively involved with the union.⁴³⁵

These five workers filed unfair labor practice charges with National Labor Relations Board, asserting that the employer had discriminated against them due to their union involvement.⁴³⁶ After a hearing, the NLRB concluded that the employer committed an unfair labor practice under Section 8(a)(1) of the Act⁴³⁷ by refusing to reinstate the five employees on the basis of union membership and activity.⁴³⁸ The Board further held that the employer violated Section 8(a)(3) of the Act⁴³⁹ by failing to reinstate the employees according to tenure of employment, thereby discouraging membership in the local union.⁴⁴⁰

On appeal, the U.S. Supreme Court affirmed the Board's findings, and remanded the case for enforcement.⁴⁴¹ Significantly, in upholding the NLRB, the Court stated that an employer who has not committed an unfair labor practice may hire permanent replacements for the striking employees.⁴⁴² This

433. *Id.* at 337.

434. *Id.* at 338.

435. *Id.* at 338-39.

436. *Id.* at 339.

437. 29 U.S.C. § 158(a)(1). Section 8(a)(1) states that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Id.* Section 7 guarantees workers the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and also the right to refrain from such activity, except as required by an agreement under Section 8(a)(3). 29 U.S.C. § 157.

438. *Mackay Radio*, 304 U.S. at 340-41.

439. *Id.*; 29 U.S.C. § 158(a)(3).

440. *Mackay Radio*, 304 U.S. at 340-41. An employer who violates Section 8(a)(3) of the NLRA is guilty of an unfair labor practice. 29 U.S.C. § 158(a)(3) (1988).

441. *Id.* at 350.

442. *Id.* at 345-46.

Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although section 13 of the act, 29 U.S.C.A. § 163, provides 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the

dicta firmly established an employer's right to hire permanent replacement workers during an economic strike, and thus counter-balanced the right of employees to engage in concerted activity for purposes of collective bargaining.

2. The Distinction Between Replacement and Dismissal

Under Section 2(3) of the NLRA, an individual, whose work has ceased as a consequence of a current labor dispute,⁴⁴³ or an unfair labor practice, continues to be an employee if that individual has not obtained regular and substantially equivalent employment.⁴⁴⁴ Once a labor dispute has ended, striking employees are entitled to return to their former positions, unless the employer can demonstrate legitimate and substantial business justifications for denying reinstatement.⁴⁴⁵ An employer who denies reinstatement to employees at the conclusion of a strike interferes with those employees' rights to organize and to strike under Sections 7 and 13 of the Act, respectively.⁴⁴⁶ Such interference is an unfair labor practice under both Sections 8(a)(1) and 8(a)(3).⁴⁴⁷

In *NLRB v. Fleetwood Trailer, Co., Inc.*, the U.S. Supreme Court acknowledged two situations in which an employer would have legitimate and substantial business justifications for deny-

right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.

Id.

443. 29 U.S.C. § 152 (1988). Section 2(9) defines a labor dispute as "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee." *Id.*

444. *Id.* § 152(3).

445. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967).

446. *Id.*

447. *Id.*

(1) It shall be an unfair labor practice for an employer — to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. §§ 8(a)(1), (3).

ing reinstatement to an employee.⁴⁴⁸ Relying on *Mackay Radio*,⁴⁴⁹ the Court noted that an employer may deny reinstatement where jobs claimed by economic strikers are occupied by permanent replacements, hired during the strike in order to continue operations.⁴⁵⁰ Moreover, the Court recognized that a second justification could exist when a striker's job has been eliminated for substantial and legitimate reasons, unrelated to labor relations, such as to improve efficiency or adapt to evolving business conditions.⁴⁵¹

Additionally, under Section 9(c)(3), economic strikers who have been permanently replaced remain eligible to vote in any election, regarding the bargaining unit or the union, conducted within one year after commencement of the strike.⁴⁵² This right is significant in that strikers are afforded the opportunity to vote in a possible decertification election, one that determines whether those in the bargaining unit wish to retain the union as their bargaining representative.⁴⁵³ The one-year limit on eligibility, however, could potentially be hazardous for an incumbent union whose members engage in an economic strike that outlasts the limit. Should this occur, the union could be faced with a decertification vote, in which the only individuals voting are the permanent replacement workers.⁴⁵⁴

3. Replacement Law During Unfair Labor Practice Strikes

Eighteen years after first announcing the right of employers to hire replacement workers during an economic strike,⁴⁵⁵ the U.S. Supreme Court, in *Mastro Plastics Corp. v. NLRB*, officially extended that right to cover unfair labor practice strikes.⁴⁵⁶ Significantly, the *Mastro* Court denied employers the right to hire permanent replacements,⁴⁵⁷ in accordance with the Act.⁴⁵⁸ Con-

448. 389 U.S. at 379.

449. *Mackay Radio*, 304 U.S. at 345-46.

450. *Fleetwood Trailer*, 389 U.S. at 379.

451. *Id.*

452. 29 U.S.C. § 159(c)(3).

453. *Id.* § 159(c)(1)(A)(ii).

454. *See id.* In an election held after one year has expired, the striking employees who have been permanently replaced no longer have voting rights. *Id.* Consequently, the permanent replacements will be the only employees eligible to vote. *Id.*

455. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

456. 350 U.S. 270, 278 (1956).

457. *Id.* at 278.

sequently, the Court guaranteed reinstatement rights to unfair labor practice strikers.⁴⁵⁹

In *Mastro*, an employee was discharged due to his organizational activities in support of a local union.⁴⁶⁰ In protest, seventy-six fellow employees immediately went out on strike.⁴⁶¹ The employer promptly responded to the strike and fired those involved.⁴⁶²

Complicating matters, the parties' contract contained a no-strike clause,⁴⁶³ which required that the union refrain from all strike activity during the life of the contract.⁴⁶⁴ Just prior to the strike, the employees had filed a request for modification of the collective bargaining agreement,⁴⁶⁵ pursuant to Section 8(d) of the Act.⁴⁶⁶ Consequently, the employees were striking during the sixty-day notice period,⁴⁶⁷ a time during which the Act prohibits strikes.⁴⁶⁸

Examining the employer's conduct, the U.S. Supreme Court upheld the NLRB's findings that the employer had wrongfully terminated all seventy-seven workers, in violation of Sections 8(a)(1) and 8(a)(3) of the NLRA.⁴⁶⁹ The employees' strike, in protest of their employer's unfair labor practice, was protected activity under the Act.⁴⁷⁰ Consequently, the Court held that employees who engage in a lawful unfair labor practice strike are entitled to reinstatement, even if the employer has hired replacement workers.⁴⁷¹

Regarding no-strike clauses, the Justices reasoned that in

458. See 29 U.S.C. § 160. Section 10(c) of the Act provides that a remedy for an employer's unfair labor practice is for the Board to order reinstatement of employees, with or without back-pay. *Id.*

459. *Mastro Plastics Corp. v. NLRB*, 350 U.S. at 278.

460. *Id.* at 273.

461. *Id.* at 273-74.

462. *Id.* at 277.

463. *Id.*

464. *Id.* at 281. The "[u]nion further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement." *Id.*

465. *Id.* at 274.

466. 29 U.S.C. § 158(d)(2).

467. *Mastro*, 350 U.S. at 274.

468. 29 U.S.C. § 158(d)(1).

469. See *Mastro*, 350 U.S. at 273. The actual text of the case does not explicitly state that the employer violated Sections 8(a)(1) and 8(a)(3). *Id.* The language that the Court used, however, indicates that those sections were violated. *Id.*

470. *Id.* at 278.

471. *Id.*

spite of the Act's strong policy against unfair labor practices,⁴⁷² parties may lawfully agree to a prohibition on all strikes by executing explicit contractual language to that effect.⁴⁷³ In the case at bar, however, the Court narrowly construed the no-strike clause to prohibit economic strikes during the life of the contract, but not unfair labor practice strikes.⁴⁷⁴ According to the majority's opinion, the exclusive economic nature of the contract, coupled with the policy concerns of the Act, warranted such a limited reading.⁴⁷⁵

Similarly, the U.S. Supreme Court narrowly construed the prohibition against strikes in Section 8(d) as pertaining only to economic strikes, based both on the policy concerns of the Act, and the legislative history.⁴⁷⁶ The Court believed that Congress had intended to afford heightened protections to employees subjected to unfair labor practices.⁴⁷⁷ Looking to the Congressional Record, the Court found support for such a conclusion.⁴⁷⁸ Consequently, the Court found that Congress could not have intended that Section 8(d) be construed so as to deprive employees of the right to strike and protect themselves against unfair labor practices.⁴⁷⁹

4. An Overview of Replacement Law in the United States

U.S. labor law prohibits an employer from firing employees who are lawfully striking for either economic reasons or in protest of an unfair labor practice.⁴⁸⁰ An employer, however, is permitted to permanently replace economic strikers and refuse to reinstate them to their jobs once the strike ends.⁴⁸¹ The right to reinstatement once a position becomes available, and the right to vote in a union election, conducted within a year after the

472. *Id.* at 279-80.

473. *Id.* at 278.

474. *Id.* at 284.

475. *Id.*

476. *Id.* at 284, 287-88.

477. *Id.* at 288-89.

478. S. REP. NO. 573, 74th Cong., 1st Sess. 6-7 (1947). "[T]o hold that a worker who because of an unfair labor practice has . . . gone on strike is no longer [protected] . . . would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby." *Id.*

479. *Mastro*, 350 U.S. at 289.

480. *Mackay Radio*, 304 U.S. at 345-46; *Mastro*, 350 U.S. at 278.

481. *Mackay Radio*, 304 U.S. at 345-46.

commencement of a strike, constitute the distinction between being permanently replaced and fired.⁴⁸² While both economic and unfair labor practice strikes may be lawful, the law confers upon the parties involved disparate legal rights, dependent solely upon the nature of the strike.⁴⁸³ Consequently, the nature of a strike is critical, defining the limits of both an employer's right to hire replacement workers and a striking employee's right to reinstatement.⁴⁸⁴

5. The Controversy Over the *Mackay Doctrine*

Unions and employees are highly critical of the *Mackay Doctrine*, arguing that no justification exists for it and that the use of permanent replacement workers is entirely inconsistent with the language and purposes of the NLRA.⁴⁸⁵ While viewed by some employers as a quick fix to labor problems,⁴⁸⁶ the use of permanent replacements adversely affects the duration of labor disputes, more than tripling the average length of strikes.⁴⁸⁷ Furthermore, critics of the *Mackay Doctrine* decry its uniqueness as the only area in U.S. labor law where employees may lose their job for engaging in protected activity.⁴⁸⁸

At the core of the *Mackay Doctrine* exists the presumption that during an economic strike, the only way an employer will be able to maintain operations is if that employer is allowed to hire

482. See *supra* notes 443-54 and accompanying text (discussing distinction between replacement and dismissal).

483. NLRB v. Fleetwood Trailer Co., Inc., 389 U.S. 375 (1967); *Mastro* 350 U.S. at 270; *Mackay Radio*, 304 U.S. at 333.

484. *Fleetwood Trailer*, 389 U.S. at 375; *Mastro*, 350 U.S. at 270; *Mackay Radio*, 304 U.S. at 333.

485. Charles B. Craver, *The National Labor Relations Act Must Be Revised To Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397 (1992); Jack J. Canzoneri, Comment, *Management's Attitudes and the Need for the Workplace Fairness Act*, 41 BUFF. L. REV. 205, 228 (1993).

486. Samuel Estreicher, *Labor Law in a World of Competitive Product Markets*, 69 CHI-KENT L. REV. 3, 45 (1993).

487. William D. Turner, *Restoring Balance to Collective Bargaining: Prohibiting Discrimination Against Economic Strikers*, 96 W. VA. L. REV. 685, 707 (1994). The average strike lasts 27.26 days, while a strike in which the employer has hired permanent replacements lasts 84.23 days. *Id.*

488. Turner, *supra* note 487, at 702. "The law pertaining to economic strikers holds the dubious and inequitable distinction of being the only niche in the whole field of labor and employment in which the employees may lose their job for engaging in protected activity." *Id.*

permanent, rather than temporary, replacement workers.⁴⁸⁹ Unions have assailed this presumption, pointing out that an employer's ability to hire replacement workers is contingent on numerous factors, which will vary depending on the circumstances involved in each instance.⁴⁹⁰ Factors that may affect an owners' ability to hire replacement workers include, but are not limited to, the level of skill required for the position, whether the business is in a rural or urban area,⁴⁹¹ and the economic state of the relevant labor market.⁴⁹²

Some commentators have argued that without the lure of a permanent position, an employer will be unable to fill jobs that require a high degree of skill.⁴⁹³ The current Major League Baseball strike, however, illustrates that such a generalization may be erroneous.⁴⁹⁴ Baseball is a highly specialized profession, requiring skilled workers.⁴⁹⁵ Despite the skill requirement, however, the Owners were able to hire a full complement of replacement workers, while only offering them temporary positions.⁴⁹⁶ Thus, the generalization that employers will only be able to hire replacements if they offer permanent positions is not necessarily

489. Roukis & Farid, *supra* note 11, at 82. "[T]he federal courts and the NLRB assume that an employer cannot continue its business during a strike unless it offers replacements permanent positions." *Id.*; Canzoneri, *supra* note 485, at 228; *contra* Mathew T. Golden, Note, *On Replacing The Replacement Worker Doctrine*, 25 COLUM. J.L. & SOC. PROBS. 51, 69 (1991) (advocating that *Mackay Doctrine* is necessary for maintaining labor balance).

490. Golden, *supra* note 489, at 69; William R. Corbett, *Replacements: "A Far, Far Better Thing" Than The Workplace Fairness Act*, 72 N.C. L. REV. 813, 872-75 (1994); Canzoneri, *supra* note 485, at 228. "Contrary to this irrebuttable presumption, the empirical evidence unequivocally demonstrates that an employer may adequately run its operations during a strike with only temporary replacements." *Id.*

491. Golden, *supra* note 489, at 69.

492. *See* Corbett, *supra* note 490, at 872. The market theory argument suggests that in an economic strike, the union will eventually prevail if the employer's proposal is inadequate, as no outside sources of labor will accept replacement positions under such terms. *Id.* Conversely, if the employer's proposal is a more accurate reflection of the value of the labor force, third parties will accept replacement positions. *Id.* "Thus, if the employer can attract permanent replacements sufficient in both quantity and quality, the demands of the union are supracompetitive, and acceding to them probably would produce an inefficient result." *Id.* at 872-73.

493. *See id.* at 874 (explaining alleged need to hire permanent replacement workers); Golden, *supra* note 489, at 69.

494. *See Who Are Those Guys?*, *supra* note 9, § 8, at 1 (discussing replacement players working for MLB teams).

495. *See NEMEC ET AL.*, *supra* note 40, at 6-11 (discussing difficulties and expertise associated with MLB).

496. Waldie, *supra* note 1, § 1, at 10.

accurate, even for highly skilled jobs.⁴⁹⁷

The most fundamental criticism of the *Mackay Doctrine* is the assertion that it is inconsistent with the goals of the NLRA.⁴⁹⁸ In enacting the NLRA, Congress believed that improved labor relations and industrial harmony could best be achieved by eliminating the inequality in bargaining power between employers and employees.⁴⁹⁹ To achieve this balance of power, Congress granted employees the right to strike under Section 13 of the Act,⁵⁰⁰ limited only by certain specific sections in the Act.⁵⁰¹ Union advocates contend that the *Mackay Doctrine* disrupts that balance by allowing employers to permanently replace lawfully striking workers, thus undermining the right to strike.⁵⁰²

6. Recent Developments Regarding the *Mackay Doctrine*

In 1991, the United States House of Representatives ("House") passed the Workplace Fairness Bill, which would have overturned the *Mackay Doctrine*, thereby prohibiting the use of permanent replacement workers.⁵⁰³ By passing the Bill, the House sought to amend Section 8(a) of the NLRA, making the permanent replacement of workers, or the threat thereof, an unfair labor practice.⁵⁰⁴ The Workplace Fairness Bill, however, was

497. See *Who Are Those Guys?*, *supra* note 9, § 8, at 1 (discussing replacement players working for MLB teams).

498. Canzoneri, *supra* note 485, at 213-16; Craver, *supra* note 485, at 421.

499. 29 U.S.C. § 151.

The inequality in bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Id.

500. *Id.* § 163.

501. *Id.* "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." *Id.*; see *supra* notes 393-403 and accompanying text (discussing right to strike in United States).

502. Canzoneri, *supra* note 485, at 213-16; Craver, *supra* note 485, at 421.

503. H.R. 5, 102nd Cong., 1st Sess. (1991).

504. H.R. 5. Under the Workplace Fairness Bill, Section 8(a)(6) would be created, making it an unfair labor practice for an employer "to promise, to threaten, or to take any action — to hire a permanent replacement for an employee who" was lawfully striking. *Id.*

not enacted into law, as the U.S. Senate failed to approve it.⁵⁰⁵ Although certain polls have indicated that a majority of U.S. citizens favored the legislation, supporters of the Bill were nonetheless unable to overcome strong Republican and business opposition.⁵⁰⁶

Almost three years later, on March 8, 1995, U.S. President Bill Clinton did what Congress had been unable to do, issuing an Executive Order (or "Order") that undermines the ability of employers to hire permanent replacements.⁵⁰⁷ Under the President's directive, entitled *Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts*, the federal government will not contract with employers that permanently replace lawfully striking workers.⁵⁰⁸ The Executive Order empowers the Secretary of Labor ("Secretary") to investigate all employers that contract with the federal government to determine whether such employers permanently replace lawfully striking employees.⁵⁰⁹ If the Secretary discovers that an employer has utilized permanent replacements, the Secretary may terminate any existing contracts with that employer,⁵¹⁰ bar that employer from receiving new Federal contracts until the labor

505. *Senate Vote Kills Bill To Restrict Use of Permanent Striker Replacements*, 117 Daily Lab. Rep. (BNA) at A-9 (June 17, 1992) [hereinafter *Senate Vote Kills Bill*]. Under Senate procedural rules, the Senate had to vote on whether to bring the bill to a vote. *Id.* Sixty votes in favor of the bill were required. *Id.* Supporters of the bill fell three votes shy, 57-42, "effectively killing the bill." *Id.*

506. *Id.* In 1993, the House passed for a second time the Workplace Fairness Bill. *Negotiators for Management and Labor Gauge Impact of Striker Replacements*, 247 Daily Lab. Rep. (BNA) at D-15 (Dec. 29, 1993) [hereinafter *Impact of Striker Replacements*]. The Senate, however, has yet to act on the measure. *Id.*; see S. 55, 103rd Cong., 1st Sess. (1993) (delineating bill to amend NLRA by making permanent replacement of workers unfair labor practice).

507. *Striker Replacements: President Issues Order Barring Permanent Replacement of Strikers*, 46 Daily Lab. Rep. (BNA) at D-3 (Mar. 9, 1995) [hereinafter *Striker Replacements*].

508. Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995), reprinted in 46 Daily Lab. Rep. (BNA) at D-28 (Mar. 9, 1995). "It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, contracting agencies shall not contract with employers that permanently replace lawfully striking employees." *Id.* § 1, 60 Fed. Reg. at 13,023, 46 Daily Lab. Rep. (BNA) at D-28.

509. *Id.* § 2, 60 Fed. Reg. at 13,023, 46 Daily Lab. Rep. (BNA) at D-28.

510. *Id.* "When the Secretary determines that a contractor has permanently replaced lawfully striking employees, the Secretary may make a finding that it is appropriate to terminate the contract for convenience." *Id.* § 3(a), 60 Fed. Reg. at 13,023, 46 Daily Lab. Rep. (BNA) at D-28. The federal agency which has contracted with such an employer may object to the termination of the contract, in which case the contract will not be terminated. *Id.* § 3(B), 60 Fed. Reg. at 13,024, 46 Daily Lab. Rep. (BNA) at D-28.

dispute that precipitated the use of permanent replacements has been resolved,⁵¹¹ and publish in the Federal Register the names of contractors that do not comply with the Order.⁵¹²

The primary purpose of the Executive Order, which will cover 28,000 contractors that do business with the Federal Government,⁵¹³ is to assist the development of stable labor relations between federal contractors and their employees.⁵¹⁴ According to the Order, the use of permanent replacements disrupts the balance of power between allowing an employer to operate during a strike and preserving the integrity of an employee's right to strike.⁵¹⁵ Furthermore, the use of permanent replacement workers adversely affects the Federal Government's efficiency and cost of operations, as the accumulated knowledge, skill, and experience of the striking employees are forever lost.⁵¹⁶

While organized labor praised the Executive Order, business leaders and U.S. Senate Majority Leader Bob Dole [R-Kan.] severely criticized the President's action.⁵¹⁷ The Republican leader Dole argued that President Clinton had usurped the legislative powers of the U.S. Congress,⁵¹⁸ and vowed to overturn the

511. *Id.* § 4(c), 60 Fed. Reg. at 13,024, 46 Daily Lab. Rep. (BNA) at D-28.

512. *Id.* § 5, 60 Fed. Reg. at 13,024, 46 Daily Lab. Rep. (BNA) at D-28.

513. *Striker Replacements*, *supra* note 507, at D-3.

514. Exec. Order No. 12,954, 60 Fed. Reg. at 13,023, 46 Daily Lab. Rep. (BNA) at D-28.

515. *Id.*

An important aspect of a stable collective bargaining relationship is the balance between allowing businesses to operate during a strike and preserving worker rights. This balance is disrupted when permanent replacement employees are hired. It has been found that strikes involving permanent replacement workers are longer in duration than other strikes. In addition, the use of permanent replacements can change a limited dispute into a broader, more contentious struggle, thereby exacerbating the problems that initially led to the strike.

Id.

516. *Id.* These circumstances reduce the quality and reliability of the goods and services for which the Federal Government contracts. *Id.*

517. *Striker Replacements: Executive Order Denounced by Business, Defended by Labor*, 46 Daily Lab. Rep. (BNA) at D-5 (Mar. 9, 1995) [hereinafter *Executive Order Denounced*]. Lane Kirkland, the President of the American Federation of Labor — Congress of International Organizations, called the Order "a welcome step towards justice in the workplace." *Id.* A business lobby, the Alliance to Keep America Working, declared that the "[Order] will result in greater labor unrest and greater costs for taxpayers." *Id.*

518. *Id.*; Jerry Gray, *G.O.P. in Senate Bows to Minority on Striker Issue*, N.Y. TIMES, Mar. 16, 1995, at A1 [hereinafter *G.O.P. Bows to Minority*].

Executive Order through congressional action.⁵¹⁹ One week after President Clinton issued the Executive Order, Senator Dole, however, abandoned his efforts, conceding that he could not gather enough support from his fellow Senators to overturn the Executive Order.⁵²⁰ Having withstood congressional attack,⁵²¹ President Clinton's Executive Order pierced the *Mackay Doctrine*,⁵²² undercutting its validity almost sixty years after the U.S. Supreme Court granted employers the legal right to hire permanent replacement workers during an economic strike.⁵²³

III. THE PROVINCE OF ONTARIO AND THE UNITED STATES SHOULD EACH ADOPT THE INTERNATIONAL LABOUR ORGANISATION'S STANDARD REGARDING REPLACEMENT WORKERS

The 1994-1995 Major League Baseball strike illustrates that while Ontario law unduly interferes with an employer's right to maintain operations during a strike,⁵²⁴ U.S. law under the *Mackay Doctrine* discriminates against workers who lawfully exercise the right to strike.⁵²⁵ The International Labour Organisation, through the CFA, has carved out a replacement law doctrine that strikes a middle ground between Ontario and U.S. Law.⁵²⁶ This ILO standard preserves the integrity of the right to strike without sacrificing an employer's compelling right to maintain business operations.⁵²⁷ Consequently, Ontario and the United States should adopt the ILO standard as it best achieves the intended goals of both the Ontario Labour Relations Act and the

519. *G.O.P. Bows to Minority*, *supra* note 518, at A1.

520. *Id.*

521. *Id.*

522. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

523. *Striker Replacements*, *supra* note 507, at D-3; Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995), reprinted in 46 Daily Lab. Rep. (BNA) at D-28, (Mar. 9, 1995).

524. R.S.O., ch. 21, § 73.1 (1992) (Can.) (instituting complete prohibition on use of replacement workers).

525. *Mackay Radio*, 304 U.S. at 345 (authorizing use of permanent replacement workers for employees who lawfully exercise right to strike).

526. Complaint Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Case No. 1543, 74 INT'L LAB. OFF. OFF'L BULL. 15, 27 (CFA 278th Rep. 1991) (asserting that *permanent* replacement of workers who legally strike is derogation of fundamental right to strike) (emphasis added).

527. See *supra* notes 255-82 and accompanying text (discussing limitations on right to strike and prohibitions against permanent replacement workers).

NLRA.⁵²⁸

A. *The Baseball Strike Under Ontario Law*

Under the relevant provisions of the Ontario Act,⁵²⁹ the Players were eligible to strike on August 12, 1994, as there was no longer a collective agreement in operation.⁵³⁰ Pursuant to Section 74(2) of the Ontario Act,⁵³¹ the Minister of Labour assigned a conciliation officer, who advised both the Owners and the Players' Association that he would not appoint a conciliation board.⁵³² The parties received notification of this decision on or about July 28, 1994.⁵³³ Consequently, the strike, which the Players initiated on August 12, satisfied the statutorily mandated fourteen-day waiting period.⁵³⁴

1. Ontario Voting Requirements and the Baseball Strike

According to statistics released by the Players' Association, among the twenty-eight teams, there were only six votes cast against the strike.⁵³⁵ While the players on the Toronto Blue Jays voted unanimously in favor of the strike,⁵³⁶ only twenty-five of the forty players listed on the official roster actually cast ballots.⁵³⁷ This voting discrepancy, if a league-wide occurrence, could potentially have provided the Owners with a ground upon which to challenge the legality of the vote under Ontario law.⁵³⁸

528. See *supra* notes 374-75 and accompanying text (discussing goal of partnership between labor and management); see 29 U.S.C. § 151 (expressing U.S. congressional desire to improve equality of bargaining power between employers and employees).

529. R.S.O., ch. 21, §§ 74, 76.

530. *Baseball '94: Going, Going . . . Gone*, *supra* note 2, at C7. The former CBA expired on December 31, 1993. *Id.*

531. R.S.O., ch. 21, § 74(2).

532. Telephone Interview with Patti Hannigan, Policy Adviser, *supra* note 392.

533. *Id.*

534. R.S.O., ch. 21, § 74(2)(b).

535. Larry Whiteside, *No Progress So Players Will Set a Strike Date Today*, BOSTON GLOBE, July 28, 1994, at 63.

536. Tim Harper & Jim Byers, *Cox Is In, Green Out for Jays*, TORONTO STAR, July 10, 1994, at E3.

537. Waldie, *supra* note 1, at 10. The twenty-five players who voted were those currently playing with the team at the major league level. *Id.*

538. R.S.O., ch. 21, § 75(5)(6). If all players listed on the roster were not afforded ample opportunity to vote, then the voting procedure may have been in violation of Section 75(5)(6). *Id.* The requirement that at least 60% of those eligible to vote approve the strike is satisfied even if only 25 players on each team voted. *Id.* § 73.1(2)(3). With only six votes cast against the strike, the approval percentage equals 61.9%. *Id.*

The owner of the Blue Jays, however, declined to challenge the validity of the vote.⁵³⁹

As the Owners have not challenged the legality of the strike vote, the Toronto Blue Jays were in a legal strike position and thus prohibited from hiring persons to serve as replacement players.⁵⁴⁰ Under the Ontario Act, the Blue Jays could have tried to field a replacement team consisting of the team's manager, coaches, and any other managerial or confidential employees.⁵⁴¹ The team, however, instead took advantage of the industry's ambulatory nature, and moved its operations to Dunedin, Florida, the location of its spring training facility.⁵⁴² Ontario law is not extraterritorial.⁵⁴³ Consequently, the Province's statutory ban on replacements workers was not applicable to the Blue Jays as long as the team remained outside of Ontario.⁵⁴⁴ By temporarily relocating to Florida, the Toronto Blue Jays successfully circumvented Ontario's prohibition on replacement workers.⁵⁴⁵

B. *The Baseball Strike Under U.S. Law*

The MLB labor dispute began as an economic strike, involving issues primarily linked to wage compensation.⁵⁴⁶ The Owners, however, on several occasions, engaged in suspect behavior, arousing suspicions that they were not bargaining with the Players' Association in good faith.⁵⁴⁷ As is evidenced by the multiple complaints issued by the NLRB, the Owners apparently failed to bargain in good faith.⁵⁴⁸

In February 1995, the Owners' unilaterally eliminated salary

539. Waldie, *supra* note 1, at 10.

540. *Id.* § 73.1(5).

541. *Id.* § 73.1(6). Managerial and confidential employees have the legal right to refuse to perform work ordinarily done by the striking players. *Id.* § 73.1(7). The Ontario Act guarantees this right by shielding managerial and confidential employees from threats, coercion, and discrimination from the employer due to a refusal to perform the work of the striking employees. *Id.*

542. *Baseball; Here They Come, the Dunedin Blue Jays*, L.A. TIMES, Mar. 18, 1995, at C12 [hereinafter *Dunedin Blue Jays*].

543. Telephone Interview with Patti Hannigan, Policy Adviser, *supra* note 392.

544. *Id.*

545. *Dunedin Blue Jays*, *supra* note 542, at C12.

546. See *supra* notes 12-15, 85-110 (discussing labor dispute between Owners and Players).

547. See *supra* notes 124-47 and accompanying text (reviewing Owners' suspected failure to bargain in good faith).

548. See *id.* (discussing unfair labor practice charges filed against Owners).

arbitration and implemented a hiring freeze regarding all unsigned players.⁵⁴⁹ These actions are unfair labor practices under Section 8(a)(5) of the NLRA, violating the duty to bargain collectively, and in good faith, over wages, hours, and other terms and conditions of employment.⁵⁵⁰ The U.S. Supreme Court has consistently held that a unilateral change of an existing term of contained in an expired CBA, before impasse is reached, is an unfair labor practice.⁵⁵¹ The Owners and Players' Association never reached an impasse in their negotiations.⁵⁵² Because the elimination of salary arbitration and individual bargaining for free agents is a unilateral change of terms that affect Players' wages, the Owners committed an unfair labor practice, thereby converting the MLB labor dispute into an unfair labor practice strike.⁵⁵³

If indeed the dispute was an unfair labor practice strike, the Owners were prohibited from hiring permanent replacement workers.⁵⁵⁴ In reality, even if the strike were an economic strike, the Owners would not have hired permanent replacements due to the total absence of a competently-skilled labor pool.⁵⁵⁵ Still,

549. Donald Fehr, *Backtalk — Major Beleaguered Baseball: The Principals in Their Words; All Compromise Came from the Players*, N.Y. TIMES, Feb. 12, 1995, § 8, at 9.

On Feb. 5, [the Owners] announced that individual clubs could no longer sign players to contracts; this would be done centrally by a bargaining committee. On Feb. 9 the clubs announced there would no longer be any salary arbitration. And the clubs said they were unilaterally eliminating the anti-collusion provision that had been in effect since 1976.

Id.

550. 29 U.S.C. §§ 158(a)(5), (d); NLRB v. Katz, 369 U.S. 736, 742-43 (1962) (declaring unilateral change of existing term or condition of employment in expired collective bargaining agreement to be unfair labor practice under § 8(a)(5)).

551. NLRB v. Katz, 369 U.S. 736, 742-43 (1962); Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991). "[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Id.* This doctrine extends to situations where "an existing agreement has expired and negotiations on a new one have yet to be completed." *Id.* The prohibition applies to all mandatory subjects of bargaining. *Id.* A mandatory subject of bargaining is one which affects wages, hours, or other terms and conditions of employment. *Id.* at 198-99.

552. See *supra* notes 132-36 and accompanying text (discussing Owners' withdrawal of an untimely declaration of impasse).

553. *Id.*; see *supra* notes 404-13 and accompanying text (discussing conversion of labor dispute from economic to unfair labor practice strike).

554. See *supra* notes 455-79 and accompanying text (discussing use of temporary replacement workers).

555. See Peter T. Kilborn, *Bittersweet Success; the Failure of Replacement Baseball Is a Labor Victory, and an Exception*, N.Y. TIMES, Apr. 4, 1995, at A16 (discussing effect of

the strike does serve as a gauge for measuring the deficiency in U.S. labor law for allowing the permanent replacement of workers.

The Owners have been obligated, since the collective bargaining negotiations began, to continue to bargain in good faith over the disputed economic issues.⁵⁵⁶ Had the Owners permanently replaced the Players, the only remaining issues to bargain over would be such areas as termination pay and reinstatement order if and when positions become available. The ability to employ only temporary replacement workers thus forces an employer to comply with Section 8(d) of the NLRA⁵⁵⁷ and make a concerted effort to settle a labor dispute. With this obligation in place, economic forces may take control and bring about a settlement that accurately reflects the legitimacy of each side's proposals.⁵⁵⁸

C. Both the United States and the Province of Ontario Should Amend Their Respective Labor Laws and Adopt the ILO Standard Regarding the Use of Replacement Workers

The ILO has articulated that employees possess a funda-

permanent replacements on labor movement and right to strike) [hereinafter *Bittersweet Success*]. Thomas Geoghegan, a labor law attorney and author of numerous articles and a book regarding labor law issues, maintains that "[t]he message here is that you have to have a unique set of skills It's odd, surreal, being in a situation where only this elite group of ballplayers can engage in a right [the right to strike] that should be everybody's." *Id.*

Few workers are so skilled that management cannot find others who can take their job right away or after a few months of training. Today only professional athletes and a few other union groups like orchestra musicians, airline pilots and machinists — among the most skilled factory workers — can call the bluff of employers who threaten permanent replacement.

Id.

556. See 29 U.S.C. § 158(d).

[T]o bargain collectively is the performance of the *mutual obligation of the employer and the representative of the employees* to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Id. (emphasis added).

557. *Id.*

558. See *supra* notes 16-03 and accompanying text (explaining effect of economic forces on labor negotiations); see *Bittersweet Success*, *supra* note 555, at A16. "Now, . . . in baseball at least, the playing field is level and the old processes of collective bargaining can resume. Negotiators who throughout the strike have postured to television cameras can now talk face to face." *Id.*

mental right to strike, which necessarily encompasses the corollary right to return to work once a strike has ended.⁵⁵⁹ Consequently, the practice of permanently replacing lawfully striking employees is incompatible with ILO standards.⁵⁶⁰ While the ILO has yet to comment directly on the use of temporary replacements, the CFA has pronounced that it is an employer's ability to hire permanent replacement workers that renders the use of replacements problematic.⁵⁶¹

Additionally, the ILO was founded upon the principle that improved labor relations, achieved through a partnership of labor and management, would help ensure social harmony.⁵⁶² The belief in the partnership is carried out through the tri-partite structure of the ILO, which seeks to establish international labor standards based on a consensus agreement involving both workers and employers.⁵⁶³ Thus, the use of temporary replacement workers is entirely consistent with the very basis of the ILO, which seeks to balance the rights of both labor and management.

1. Ontario Law

Ontario's comprehensive ban on the use of replacement workers during a lawful strike fails to achieve the balance sought by the ILO by not protecting an employer's basic right to maintain operations.⁵⁶⁴ The Toronto Blue Jays were able to temporarily relocate for the duration of the strike, and thus avoid the prohibition against replacement workers.⁵⁶⁵ Most businesses,

559. See COMMITTEE OF EXPERTS, *supra* note 252, at 76-78 (discussing impermissible effect permanent replacements have on right to strike).

560. *Id.*

561. See *supra* notes 276-82 and accompanying text (explaining that use of replacements for indefinite period severely interferes with right to strike).

562. See *supra* notes 157-69 and accompanying text (discussing structure and goals of ILO); ILO CONST. pmbl., art. 1(1), 62 Stat. at 3490-92, 15 U.N.T.S. at 40-42; PHILADELPHIA DECLARATION art. III(e), 62 Stat. at 3558-60, 15 U.N.T.S. at 108. "[T]he effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures." *Id.*

563. See *supra* notes 157-69 and accompanying text (discussing structure and goals of ILO).

564. See *supra* notes 333-45 and accompanying text (discussing Ontario's sweeping prohibition on use of replacements).

565. See *supra* notes 540-45 and accompanying text (discussing Blue Jay's ability to move operations during strike).

however, when faced with a strike, will not have the ability to relocate in order to maintain operations. The Blue Jays' ability to relocate was a function solely of the ambulatory nature of the industry, which ordinarily involves operating at the various cities throughout MLB.

Consequently, Ontario's ban on replacement workers, instituted to encourage labor-management co-operation, unnecessarily assumes that unions will not abuse their power to strike, thereby closing down an employer.⁵⁶⁶ As the ILO has emphasized, the evil that must be avoided when replacement workers are involved in a labor dispute is the threat or actual use of permanent replacements.⁵⁶⁷ Just as the U.S. practice of using permanent replacement workers swings the balance of power strongly in favor of employers, granting them the ability to break a union, the complete prohibition on replacement workers potentially empowers unions and employees to act recklessly and impose potentially deleterious financial demands upon an employer.⁵⁶⁸ The use of temporary replacements, however, eliminates both of these concerns, acting as a check against both voracious Owners and imprudent striking employees.

2. U.S. Law

The fundamental purpose of the National Labor Relations Act is to diminish the ability of both employers and unions to disrupt the free flow of commerce in the United States.⁵⁶⁹ The

566. *Job Creator or Job Killer?*, *supra* note 374, at A19.

567. See *supra* notes 266-82 and accompanying text (discussing problem of permanent replacement workers).

568. See Roukis & Farid, *supra* note 11, at 86-91 (discussing how both use of permanent replacements and unreasonable bargaining positions may be used as destructive economic weapons). One study found that in situations in which employers hired permanent replacement workers, unions failed to survive the strike in 40% of the cases. *Id.* at 86.

569. See 29 U.S.C. § 151.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing commerce [C]ertain practices by some labor organizations, their officers, and members have the intent or necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest The elimination of such practices is a necessary condition to the assurance of the rights herein contained.

Id.

Act endeavors to protect the flow of commerce by equalizing bargaining power between employees and employers, thereby levelling the collective bargaining playing field.⁵⁷⁰ The use of permanent replacement workers during an economic strike upsets this balance of power, contrary to the intent of the NLRA.⁵⁷¹ While economic strikers do retain certain rights under the Act after an employer has permanently replaced them, the Supreme Court was splitting hairs in 1938 when it announced the *Mackay Doctrine*. In reality, there is no practical difference between being permanently replaced and fired. Both situations leave the employee without a job. Consequently, the legality of permanent replacements effectively denies an employee of his or her right to strike in support of an economic agenda.⁵⁷²

The United States, which already sanctions the use of temporary replacement workers, should adopt the Workplace Fairness Act,⁵⁷³ or similar legislation, and ban the use of permanent replacement workers.⁵⁷⁴ The U.S. Congress must recognize that the Supreme Court enunciated the *Mackay Doctrine* during the height of the Great Depression, a time that acutely influenced

570. *Id.*

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, and other working conditions, and by restoring equality of bargaining power between employers and employees.

Id.

571. See *supra* note 499 and accompanying text (discussing goal of NLRA to eliminate inequality of bargaining power and realize full freedom of association for employees).

572. See *Bittersweet Success*, *supra* note 555, at A16.

In many other labor disputes of recent years, the mere threat of permanent replacements has blunted the spirit of the fight. Workers have stayed on the job and settled for less than they otherwise would have, a factor that has contributed to a decline in wages for most workers for two decades and has helped employers chip away at pensions and health benefits. Unions, unable to assuage their fears, have seen membership levels plunge, and organized labor now represents just 11.2 percent of private-sector workers, less than half what the figure was during labor's heyday in the 1950's.

Id.

573. See *supra* notes 503-06 and accompanying text (discussing the Workplace Fairness Act).

574. See *supra* notes 503-23 and accompanying text (discussing recent developments regarding *Mackay Doctrine*).

the acts of both the judiciary and the legislature. After almost sixty years under the *Mackay Doctrine*, the United States should eradicate the lawful use of permanent replacement workers and thereby harmonize the NLRA with the standards of the International Labour Organisation.⁵⁷⁵

CONCLUSION

The stated goals of the International Labour Organisation, the Ontario Labour Relations Act, and the National Labor Relations Act all indicate a desire to improve labor standards by balancing the rights of both employers and workers, thereby leveling the collective bargaining playing field. The practice in the United States of allowing employers to permanently replace lawfully striking economic workers destroys this balance, diluting the right to strike. Conversely, Ontario's statutory ban on the use of even temporary replacement workers grants employees an unchecked power to force upon an employer potentially unreasonable economic demands. A compromise between U.S. law and Ontario law, such as the ILO sanction of temporary replacement workers, would restore balance to the collective bargaining process and allow workers and employers to conclude agreements that more accurately reflect the market value of a business' employment and a worker's labor.

575. See Roukis & Farid, *supra* note 11, at 88. The United States is the only Western Industrialized Country that permits the use of permanent replacement workers. *Id.*