SURVIVING A 101 DAY MUNICIPAL STRIKE
OR HOW I SPENT MY SUMMER VACATION

MOMMY, IT'S OVER

1. On July 24, 2009, day 101 of the strike of its outside workers and day 98 of a strike of its inside workers, the roughly 1,800 striking workers voted to ratify the tentative agreement reached between the City and Union negotiators after a marathon bargaining session, guided by John Miller, a Ministry of Labour mediator. They returned to their jobs on Monday, July 27. As City Solicitor, I've was intimately involved in all elements of the strike, including being married to a member of the inside workers bargaining unit….sleeping with the enemy.

THE BACKGROUND

2. Windsor, Ontario is a City of roughly 218,000 residents, and is the southernmost City in Canada, at roughly the same latitude as northern California. Windsor has always been a "union town". It has plants of the former "Big 3" as well as many feeder plants. You may recall that the Rand formula of mandatory payment of union dues resulted from the 99 day Windsor Ford strike of 1945. The workers at Caesars Windsor also took a gamble and joined the CAW.

3. Windsor is a "single-tier, separated City". It provides all municipal functions for its residents, operates two pollution control plants, a central waste drop-off site, delivers the social welfare and housing programs to the residents of both the City and the County of Essex and owns the Canadian half of an international border crossing, the Windsor-Detroit Tunnel. Unlike Toronto, public health is not a City function. The Health Unit is a separate entity. The Windsor Utilities Commission, a municipal service board, handles water. Electric power is provided by EnWin, a corporation wholly-owned by the City.

THE UNION

4. City staff are members of the Canadian Union of Public Employees (CUPE). We have Local 543 representing approximately 1,400 inside workers (including seasonals) and Local 82 representing approximately 400 outside workers. Some work over the years has been contracted to the private sector, however, core functions such as refuse and recycling pickup are still handled by unionized employees.

5. The previous CUPE contracts ran for 4 years, with annual wage increases of 3% and expired December 31, 2008.

"THE" BONE OF CONTENTION

6. Windsor workers enjoyed a very unusual bonus feature as a result of their jobs, one shared by only one or two other major municipalities in Ontario, namely the

provision of post-retirement benefits for life for employees and their spouses. These were not achieved by CUPE as a result of negotiations, but became part of the package for Windsor's employees in the late 1940's and early 1950's as a result of a sympathetic council deciding to help the families of two police officers who were killed in a car accident. CUPE did not organize Windsor's workers until 1953. The actuarial calculation of the unfunded liability of these benefits for existing employees was $291 million for all city employees including Police and Fire. Of this, about $97 million pertained to the members of Locals 543 and 82.

7. Council was very concerned about this large and growing unfunded liability and the deletion of this benefit for new hires of the Corporation became the major concession demanded by the City in the negotiations. Wages of course were the other major concern. Windsor's unemployment rate, at roughly 15%, is the highest in Canada. The CAW members at Chrysler and General Motors (and likely Ford) were forced to give major concessions. Unfortunately, CUPE did not accept that this reality should have any impact on its wage demands.

THE IMPACT OF THE TORONTO STRIKE

8. Another matter of concern for CUPE national and provincial was that any concessions that it was seen to give in Windsor would have some impact on the strike of CUPE workers in Toronto (settled after 6 weeks) and other municipalities in which negotiations were proceeding. For the first time ever, representatives of CUPE National participated in the Windsor negotiations. Contract negotiations in previous years had only the local CUPE representative in attendance. He was largely a silent participant in the talks.

THE START OF THINGS

9. Negotiations started in the fall of 2008. The City's opening position was that post-retirement benefits for all new hires were to be eliminated, and that the contracts had to be "net-zero", in other words, any wage increases or enhancements to benefits had to come from cost reductions in other benefits, such as reduction in sick leave (presently 18 days per year, cumulative but not carrying any monetary payout upon retirement), or an increase in the co-pay for prescription drugs.

10. The unions were not interested in discussing post-retirement benefits and were looking for a substantial wage increase. The City was interested in moving matters along during the cold weather and in early January called for conciliation after four bargaining sessions. The Unions voted 95% and 97% to strike. Eventually the Conciliation Officer delivered a "no-board report" and that eventually resulted in strike dates of April 15 and 18 for the two unions. The unions' interest was in dragging things out until warmer weather, when picketing would be more comfortable and garbage issues would be more of a concern to residents. Apparently, mother nature is not a union sympathizer and delivered a cool spring and early summer.

11. Windsor's last strike was in January of 2002 and only of the inside workers. They found, much to their chagrin, that the average resident had little to no contact with City Hall and the strike as a result did not cause them any inconvenience whatsoever. That strike lasted 4 weeks with the union eventually accepting the same offer they had turned down before the strike.

THE PLAN

12. Windsor took to heart the "Boy Scout Motto" - BE PREPARED. In preparation for what administration expected would be a prolonged work stoppage, the City developed a "Business Continuity Plan 2009", subtitled "A Proposal to Establish a Structured and Comprehensive Response during a Disruption to Normal Business Functions, Operations, and Services in the Event of a Work Stoppage" (a title almost as long as the strike).

13. Administration first reviewed what activities had to be continued (such as pollution control plants, home for the aged, Ontario Works (social welfare), licensing, building inspections, courts, tax billings), what functions it could offer on a reduced basis and what functions would be suspended during a work stoppage (such as refuse, recycling and yard waste pickup, parking enforcement, by-law enforcement, grass cutting, operation of swimming pools, and a service delivery review process).

14. The resulting 3-1/2 inch thick binders contained detailed confidential information for Department Heads and other senior staff. Because of the sensitivity of the information contained in the binders, each binder was numbered and a record made of who received each of the 31 binders. The Plan was submitted to City Council and approved as Council Policy although Council did not, except for the Mayor, receive a copy.

PROACTIVE

15. The Plan was created in anticipation of what might be encountered during the strike. The first matter dealt with was who would contact non-union staff in the event of a strike and where they could be reached. For example, the CAO would call the General Managers, they would then call their Executive Directors, who would call their Managers and Supervisors. Contact names, addresses and phone numbers were included for all City facilities including arenas, day care centres, community centres, solid waste disposal site and the pollution control plants. This central source of contact information proved to be a great time saver. The roles and responsibilities of each level of management was also defined and set out in the plan.

CRITICAL PATH

16. A Critical Path document was developed, setting out all of the tasks that had to be undertaken in preparation for a strike, those that had to be done once the strike had

begun, and those that had to take place after the strike was over, who was responsible for each task and a reference to a detailed explanation of each task that was contained in the plan. Typical tasks were, identifying which staff had to remain in their home job and who could be redeployed, who was responsible for disabling e-mail access, voice-mail, pass cards, purchasing cards, how and by whom keys for City vehicles would be collected, and setting out secure locations where vehicles were to be stored.

COMMUNICATIONS PLAN AND SECURITY PLAN

17. A detailed Communications Plan setting out who would be the spokesperson for the City, and a detailed Security Plan were developed. In anticipation of potential picket-line violence, surveillance cameras were installed and a security company, specialized in working in labour disputes was retained. Take care to ensure that any cameras and the resulting video evidence are managed in compliance with guidelines of the Privacy Commissioner in your jurisdiction. Protective film was installed on vulnerable windows. As an aside, our strike was relatively free of violence…. a few tire slashings, a couple of minor assaults, some broken windshields, some death threats, a lot of "F" words, one finger salutes, but nothing major. The security company head contrasted our "violence" experience with that of the first strike that he worked, at Falconbridge Mines in Sudbury, at which the helicopter carrying the security team into the mine site was shot at and the investigating officer's police car was rolled over and burned….and that was at the start of the strike.

DEPARTMENTAL BUSINESS CONTINUITY PLAN

18. Each Department prepared their own Departmental Business Continuity Plan, setting out how they would operate during a strike, what services would be maintained, reduced and eliminated, and whether they would require staff to be deployed to them from other departments. We found that Public Works was able to take of its own operations, with engineers normally performing office functions being redeployed to operate the pollution control plants. Social and Housing Services was a big draw on staff, especially given Windsor's high unemployment rate. Legal Services Division was left alone until near the end of the strike but was eventually asked to give up some staff to Social Services. My assistant actually enjoyed the experience of working in the Social Services area, helping people who were in extreme need of assistance. Fortunately our entire Provincial Offences Division is non-union and was able to continue to operate the 3 courts without interruption or picketing.

GETTING THE POLICE ON SIDE

19. It's important before and during a strike to develop and maintain a good relationship with the Police. Fortunately, since I'm also the Legal Counsel for the Police Services Board, I have a long-standing excellent relationship with senior police administration and can reach them quickly by phone or e-mail when needed. Meetings were held with the Chief of Police, the Deputies and Senior Officers to clarify what level of police involvement could be expected during a strike, who were the primary contacts

and alternates in case they were not available. Windsor has two senior staff sergeants who are their labour dispute specialists and who instruct the front-line constables in strike situations. The police protocol is such that a strike is a private dispute between two parties, and is a civil matter. They see their role as being to protect the health and safety of both striking and non-striking employees, and the general public. They will ordinarily only intervene in the event of tortious or criminal conduct and even then will only in the most extreme circumstances arrest someone. Such protocol is apparently typical, as Hackland J. pointed out in *Cancoil v. Abbott*, referred to later in this paper, *"The Kingston Ontario police policy on strikes and lockouts **sensibly** advises that: where delays at picket lines are occurring, reasonable delay times should be negotiated between labour and management."*

PRELIMINARIES FOR INJUNCTIONS

20. The City Solicitor was authorized to retain external legal counsel with expertise in obtaining injunctions in labour disputes. Meetings took place in advance of the strike to develop procedures that would be followed if situations arose that potentially warranted an application for an injunction. Templates were created with property addresses and descriptions in order to be ready should an interim emergency injunction application be pursued.

21. It's important to explain to the Mayor and Council and to senior administration what an injunction is all about, what it takes to get one, and what to expect that the injunction will prevent and allow. You may consider giving them a copy of the Supreme Court of Canada decision in *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 or for a shorter lay version the writeup on the case in Wikipedia. The case also defines the law with respect to secondary picketing…what's allowed and not allowed.

22. They need to have an appreciation that the although section 175 of the *Criminal Code* sets out that every one who not being in a dwelling house causes a disturbance in or near a public place by impeding or molesting other persons or loiters in a public place and in any way obstructs persons who are in that place, is guilty of an offence punishable on summary conviction, section 423 creates an offence of intimidation, and section 430 creates an obstruction offence, courts have held that picketing is a fundamental right, protected under the Canadian Charter of Rights and Freedoms as "freedom of expression". Many situations come down to managing expectations. For example, at many sites pickets were not present on a 24-7 basis. In order to expedite non-union staff entering work sites, many non-union staff arrived at work before the picket lines went up.

23. You need to explain to the stakeholders that to be successful in obtaining an interim injunction, many factors must come together, such as the availability of a Judge who understands labour disputes, and evidence that the police are not able or are not willing to assist persons to cross picket lines. In the case of *Hydro One Inc. v. Rattal*, 2005 WL 4074955 (Ont. S.C.J.), 2005 CarswellOnt 8912 Campbell, J. referred to the decision of Justice Osler in *Windsor (City) Board of Education v. O.S.S.T.F.* (1974), 7

O.R. (2d) 26 (Ont. H.C.) in which he referred to his earlier decision in *Nedco Ltd. v. Nichols,* [1973] 3 O.R. 944 (Ont. H.C.) and indicated that there he had expressed the view the compliance with section 20(3) (now 102), (*reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry or exit from the premises in question or breach of the peace have been unsuccessful*) was a condition precedent to the obtaining of the injunction in a labour dispute whether or not force and violence was being used in connection with the dispute. The Justice notes that *"he went on to say that the obvious intent of the legislation in present section 102 of the Courts of Justice Act was to* ***restrict the use of the injunction and especially the interim or interlocutory injunction as a weapon or as a remedy in a labour dispute****."* (emphasis added)

THE HOT SPOTS

24. The Unions first concentrated on trying to shut down the critical operations, being the two pollution control plants (sewage treatment plants). The major plant was still under construction at the beginning of the strike, having undergone a $110 million upgrade to add secondary and tertiary treatment capability and needed completion of the installation of equipment crucial to its proper operation. It's important to understand that if a plant had to be shut down, the only 2 choices, both not palatable, would be to release millions of gallons of raw sewage into the Detroit River, or to allow thousands of basements to fill with raw sewage. The facilities also operate on somewhat of a "just-in-time" basis. There is little storage capacity for the chemicals necessary for the treatment process or for the sludge resulting from the process. Trucks have to bring in supplies on a daily basis and to remove sludge on a daily basis. Mass picketing occurred at the entrances to the 2 facilities and police control was minimal. An injunction had to be sought to bring some order back to these sites.

THE INJUNCTIONS

25. The City decided to make application for an emergency injunction. In Ontario, injunctions in labour disputes are provide for by section 102 of the *Courts of Justice Act*, R.S.O. 1990, chapter C43, reproduced below:

> **102.**(1)In this section,
>
> "labour dispute" means a dispute or difference 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.
>
> **Notice**
>
> (2)Subject to subsection (8), no injunction to restrain a person from an act in connection with a labour dispute shall be granted without notice.

Steps before injunction proceeding

(3)In a motion or proceeding for an injunction to restrain a person from an act in connection with a labour dispute, the court must be satisfied that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry or exit from the premises in question or breach of the peace have been unsuccessful.

Evidence

(4)Subject to subsection (8), affidavit evidence in support of a motion for an injunction to restrain a person from an act in connection with a labour dispute shall be confined to statements of facts within the knowledge of the deponent, but any party may by notice to the party filing such affidavit, and payment of the proper attendance money, require the attendance of the deponent to be cross-examined at the hearing.

Interim injunction

(5)An interim injunction to restrain a person from an act in connection with a labour dispute may be granted for a period of not longer than four days.

Notice

(6)Subject to subsection (8), at least two days notice of a motion for an interim injunction to restrain a person from any act in connection with a labour dispute shall be given to the responding party and to any other person affected thereby but not named in the notice of motion.

Idem

(7)Notice required by subsection (6) to persons other than the responding party may be given,

(a) where such persons are members of a labour organization, by personal service on an officer or agent of the labour organization; and

(b) where such persons are not members of a labour organization, by posting the notice in a conspicuous place at the location of the activity sought to be restrained where it can be read by any persons affected,

and service and posting under this subsection shall be deemed to be sufficient notice to all such persons.

Interim injunction without notice

(8)Where notice as required by subsection (6) is not given, the court may grant an interim injunction where,

(a) the case is otherwise a proper one for the granting of an interim injunction;

(b) notice as required by subsection (6) could not be given because the delay necessary to do so would result in irreparable damage or injury, a breach of the peace or an interruption in an essential public service;

(c) reasonable notification, by telephone or otherwise, has been given to the persons to be affected or, where any of such persons are members of a labour organization, to an officer of that labour organization or to the person authorized under section 89 of the *Labour Relations Act* to accept service of

process under that Act on behalf of that labour organization or trade union, or where it is shown that such notice could not have been given; and

(d) proof of all material facts for the purpose of clauses (a), (b) and (c) is established by oral evidence.

Misrepresentation as contempt of court

(9)The misrepresentation of any fact or the withholding of any qualifying relevant matter, directly or indirectly, in a proceeding for an injunction under this section, constitutes a contempt of court.

Appeal

(10)An appeal from an order under this section lies to the Court of Appeal without leave. R.S.O. 1990, c. C.43, s. 102.

26. We proceeded to apply, with notice to the unions, for an interim injunction. You'll note in subsection 5 that an interim injunction is limited to a maximum of 4 days duration. Strangely enough, the unions did not want to argue against the granting of an injunction. Although it is quite possible, based on the case law, that we had insufficient evidence to have the Justice grant an injunction, we were able to negotiate the terms of an injunction with their legal counsel. We then attended in Chambers with the Justice, who signed the Order on the basis of the unions not opposing it being granted. The following week we were able to again agree on an extension of the injunction for a further 4 days, followed by a "fresh" injunction being granted for another 10 days. When that expired, we elected not to proceed with new injunctive relief.

THE EFFECT OF THE INJUNCTIONS

27. We were now, with the assistance of the police, able to better control entry to and exit from City premises. We were also able to get the Ironworkers Union and Millwrights Union members to cross the picket line to finish work at the pollution control plant. The injunction limited the delay to 5 minutes. Take that with a "grain of salt". Five minutes was the case, if a police officer was present, and if the officer decided to enforce the 5-minute rule. Don't expect that an injunction is a "cure-all" for strike situations. Strikers took the 5 minute provision to heart and ensured that everyone was held for at least 5 minutes. That meant that if 10 people were in line, number 10 waited at least 50 minutes.

28. Chair Asbell of the Alberta Labour Relations Board considered the issue of cumulative delay in the case of *Lakeside Feeders Ltd. v. U.F.C.W., Local 401*, [2006] A.W.L.D. 120, [2005] Alta. L.R.B.R. LD-062. The Employer claimed that obstruction of each vehicle leading to excessive cumulative delays (as long as 6 hours) amounted to tortious activity prohibited by the Alberta Labour Relations Code. Chair Asbell canvassed what was "reasonable delay", determined that there was insufficient evidence of true economic impact on the employer (if any) of the cumulative delays, and declined to find that this behaviour constituted a tortious act.

29. In the case of *Cancoil Thermal Corp. v. Abbott* 204 C.L.L.C. 220-045, employees entering the premises of a company related to the struck firm were being held up for 15

minutes each, both going and coming, timed from when the person reached the front of the line. In addition, vehicles were delayed for 15 minutes per passenger, such that if a car held 3 occupants, it was held for 45 minutes. Hackland J. dismissed the application for an interlocutory injunction, ruling *"I do not find that the level of obstructive conduct either in its nature, duration or effect, exists so as to establish the required prima facie case for the granting of injunctive relief, or to establish compliance with section 102 of the Courts of Justice Act."*

30. It's worthy of note that the Justice seemed to be annoyed by the fact that *"the company continues to decline the union's on-going, apparently good faith invitation to negotiate a mutually acceptable picket line protocol"*. Thus, it's best to exhaust all other possibilities before applying for injunctive relief.

OTHER CONTROL OVER PICKETING

31. At the start of the strike the City agreed to maintain health benefits coverage for the striking employees, at CUPE expense. This agreement was contingent upon employees conducting themselves appropriately during the strike. As a result of flagrant breaches such as *http://www.youtube.com/watch?v=EAqMn4gEe00,* showing a striker dumping garbage in a City park (85,246 hits), the assault of a BFI employee, and decorating the Mayor's car with women's underwear, several striking employees' benefits were cancelled. The threat of cancellation likely helped to maintain peace on the picket line.

WASTE MANAGEMENT - Sometimes your apparent "Enemy" may be your "Friend"

32. Before the start of the strike, the City confirmed that 3 private disposal sites had the proper MOE certification to operate and agreed to be open to accept yard waste, recycling and garbage from the public and then advertised heavily on radio and in the newspaper the availability of these sites. The CUPE picketers at the City's closed waste drop-off site encouraged dumping by residents at the entrance to the site. Eventually the resulting mountain of garbage caught on fire, after which the Ministry of the Environment issued an Order to the City to clean up the site. Our Police were extremely cooperative, basing their need to assist on the MOE order. At midnight one night they closed off all access roads to the site and the private hauler moved in, completing the clean-up in 4 hours.

33. Two of our abutting municipalities alleged that Windsorites were dropping off their garbage for pickup by their staff. Politicians discussed billing Windsor for this unauthorized service.

34. Although in our estimation roughly 70% of the garbage generated in the City was ending up in the landfill and many residents were storing their garbage, the MOE felt it necessary to order the City to set up free dumpsites. MOE provided a draft order for comment that would have required 7 sites to be set up. Garbage was not to be allowed to be stored at these sites and was to be removed daily. Because these would have had to be

operated by private parties at an enormous cost, administration was able to work with MOE staff to reduce the requirement to 2 sites, one of which was the City's own drop-off site, which could be staffed by City non-union personnel, the other to be privately operated.

35. Towards the end of the strike, MOE ordered a third site, closer to the downtown area, to be set up. The more sites that were being picketed resulted in additional thinning of police resources to handle the delays.

CROSSING THE LINE

36. Section 80 of the *Labour Relations Act* provides a legal basis for striking employees to cross the picket line to return to work.

80. (1) Where an employee engaging in a lawful strike makes an unconditional application in writing to the employee's employer within six months from the commencement of the lawful strike to return to work, the employer shall, subject to subsection (2), reinstate the employee in the employee's former employment, on such terms as the employer and employee may agree upon, and the employer in offering terms of employment shall not discriminate against the employee for exercising or have exercised any rights under this Act.

Exceptions

(2) An employer is not required to reinstate an employee who has made an application to return to work in accordance with subsection (1),

(a) where the employer no longer has persons engaged in performing work of the same or similar nature to work which the employee performed prior to the employee's cessation of work; or

(b) where there has been a suspension or discontinuance for cause of an employer's operations, or any part thereof, but, if the employer resumes such operations, the employer shall first reinstate those employees who have made an application under subsection (1). 1995, c. 1, Sched. A, s. 80.

37. Windsor considered whether to allow union members to cross and return to work. Issues reviewed were:

- potential sabotage of City activities by returning workers
- picket line violence generated by union members crossing the line
- potential penalties that might be imposed on union members who chose to return to work.
- Animosity towards crossers by non-crossers after the strike was over

Ultimately the decision was made to lock out striking employees if any made application to return to work. Although there were inquiries made by some employees, no one actually applied to return.

38. Windsor is a closed shop employer. All bargaining unit jobs must be filled by union members. Crossing a picket line is against the CUPE Constitution.

The *C.U.P.E National Constitution* states:[1]

> **B.VI TRIALS**
> **B.6.1** Every member of a Local Union is guilty of an offence against the Constitution who:
> (m) Fails to respect the Local Union's picket line, or works for the employer during a legal strike or a labour dispute, or engages in any strike-breaking activities;

The penalty provision states:

> **B.6.4**
> (g) If the accused is found guilty the Trial Committee shall recommend the appropriate penalty or punishment and it may determine what, if anything, the accused shall do or refrain from doing with respect to the complaint or complaints. This determination, without limiting the generality of the foregoing, may include a reprimand, fine, expulsion, suspension or prohibition from holding membership or office; an order directing the member or members to cease doing the act or acts complained of; and an order directing the members to rectify the act or acts complained of.

39. When a person joins a union it creates a relationship *"in the nature of a contract" Berry v. Pulley*, [2002] 2 S.C.R. 493 (SCC), the Union Constitution being the contract. In *L.I.U.N.A., Local 183 v Ferreira, L.I.U.N.A., Local 183 v Ferreira* [2009], 2009 CarswellOnt 793 (C.A.) the Ontario Court of Appeal held that such a contract can be described as an *"adhesion contract"* and that, *"Those who join the union have no bargaining power to affect the terms of membership and, in many situations, membership is a prerequisite to employment, leaving the individual with little choice but to accept the constitution and its terms."* The court held that union members agreed to be, *"…bound by local constitution's discipline process for alleged offences..."*

40. A union member who crossed the line could have their union membership revoked, leaving them without a job. In the case of *Carbin v I.A.M.*, 1984 CarswellNat 798 (Canada Labour Relations Board), the Board noted that: " *In Canada expulsion is a common response to crossing a picket line. 'Unions may be particularly harsh on those members who cross the picket lines erected pursuant to lawful strike activity and return to work. A handful of dissident strikebreakers could erode and even break an otherwise successful strike. At the same time, however, while the union interest in maintaining solidarity is understandable and entirely defensible, the individual union member may claim that he has legitimate reasons to dissent. … There is little doubt that if employees were free to return to work during the strike without fear of being subjected to*

[1] *C.U.P.E. National Constitution, 2007*, found at: http://cupe.ca/updir/Constitution07.pdf.

reasonable discipline for violating the rules and regulations governing their union membership, the union would experience severe difficulty both in maintaining the effectiveness of that particular strike and in mounting similar activity in the future. The power to fine or expel strikebreakers is essential if the union is to continue as an effective bargaining agent. Thus, while the union's interest is best vindicated by disciplining its members for strikebreaking, the public interest is in seeing that such discipline does not exceed what is reasonable in the circumstances."

41. In *Community Living Oakville v O.P.S.E.U.* (2003), 121 L.A.C. (4th) 374 (Ont. Arb. Bd.) the Board held, *"It should be clear that in so finding, I am not in any way suggesting that in the absence of an agreement not to take reprisals coming out of a strike there is anything inappropriate or unlawful about a union fining or suspending employees who cross picket lines. The authorities are clear that unions are entitled to take these steps…"*

42. In the recent Court of Appeal decision in *Birch v Union of Taxation Employees, Local 70030* (2008), 93 O.R. (3d) 1 (C.A.) the court suggested that penalty clauses in contracts should be reviewed in terms of whether they are *"unconscionable"* in the circumstance. A "*penalty clause"* in a union constitution is enforceable as long as it is not unconscionable. The Court applied a two-part analysis to determine if the penalty was *"unconscionable": "…a finding of inequality of bargaining power and a finding that the terms of an agreement have a high degree of unfairness."*

43. The employees who had crossed the picket line and returned to work were suspended from membership and fined by the union. The union sought to enforce the fines at Small Claims Court. The issue of the suspension from membership was not raised, only the fine.

44. The penalty clause in the constitution stated:

> ***Section 25(3)***
> *Any disciplinary action taken under the provisions of Sub-Sections (1) and (2) of this Section for a cause listed in Sub-Section (5)(n) of this Section shall include the imposition of a fine that equals the amount of daily remuneration earned by the member, multiplied by the number of days that the member crossed the picket line, performed work for the employer or voluntarily performed struck work.*

45. In the analysis provided in the above case concerning the test, it would seem that there will always be found an inequality of bargaining power between a member and the union because such power is determined when the contract is actually formed, which will always be when the member has no ability to alter or amend a union constitution.

46. The second part of the test is an analysis of whether the penalty set out in the union constitution is *"very unfair"*. In *Birch* the court held that the fine imposed was *"very unfair"*. It represented the gross pay the employees received after returning to work. The union argued that the fine was based on the damage done to the union by the employees crossing the picket line to return to work. The Court found little evidence of such damage and dismissed the appeal by the union to collect the fine it had imposed.

The Court determined that the fine was many times greater than the damages that the union was able to prove. Also, the Court said that the penalty must always be analyzed in the context of that particular employee's situation. The union did not argue breach of contract to enforce the fine.

47. It is suggested that any penalty imposed by a union on a member would be looked at through the same analysis. Would a suspension be considered "less harsh" than a fine? The revoking of a membership, particularly in a closed shop environment, may be viewed as being "very unfair" when taken in the context of the particular employee's situation. (i.e. length of time employee already out of work, bills to be paid, family situation, etc…)

HOW DID WE KEEP OPERATING?

48. Prior to the strike, administration met with our Civic Association of Non-Union Employees to develop an hours of work and overtime policy. Wage rates for non-union staff performing bargaining unit work on an overtime basis were agreed upon, based on 1-1/2 times the highest CUPE job rate past 44 hours and double time for Sundays and holidays. Non-union staff rose to the challenge big-time. Engineers who normally managed construction projects were re-assigned to the 2 pollution control plants. They worked long hours, 7 days a week to keep things running properly. Social Services brought in staff from other departments, including planning, finance, human resources, and legal to process applications for assistance. Canada Post and couriers discontinued service to the City during the strike and arrangements were made for pickups by City staff. Some non-union staff worked 3 jobs, being at Social Services during the day, then several hours back at their real jobs and then 2 hours cleaning toilets and collecting garbage at City Hall. Garbage packers could not be used, as non-union staff lacked the proper licences to drive these vehicles.

49. Council approved the suspension of many procedures that would ordinarily have required Council decision and delegated the authority to the Chief Administrative Officer, with subsequent reports by him to Council on actions taken. This was a great help in getting things done, especially with Council on the summer schedule of a meeting every 2 weeks.

50. History was made….the union tradition of fire barrels burning at every picket site was banned by the Fire Chief.

THINGS THAT WENT WRONG

51. On April 25th it became apparent that Mother Nature was anti-union. A small tornado ripped the roof off CUPE headquarters.

52. Beware of "false prophets"! There is a perception that our strike went longer than it should have because of false information being disseminated by people who were of the opinion that they were helping to resolve the issues but were in fact raising false hopes among the union negotiating teams. Hard to control….

53. The union made an offer that they asked to be presented to Council. That offer was the first breakthrough for the City on the Post-retiree benefits issue. The details of the union offer and the City's latest offer were leaked to the media. As a result, the negotiations went off the rails and several weeks were lost before bargaining resumed. The union denied agreeing to take away the benefits from new hires. It then delivered a 10-page diatribe of *"Unfair Labour Practice"* allegations, claiming breaches of sections 17, 70, 72, and 76 of the *Labour Relations Act, 1995*. Ironically, one of its allegations was that "*The information disseminated by the A Channel News Story was exactly the proposal which had been tabled by the CUPE Locals."*

54. At the request of a Councillor, the "Leak" was then subjected to investigation by the City's Integrity Commissioner. At the date of this writing, the report has yet to be released.

55. Council generated an offer that it wanted the Unions to take to their members for a vote. No Return to Work Protocol had been agreed to. The City's external legal counsel drafted a RTWP and Management and non-union staff were then sent to the hall at which the vote was being held, to hand out the RTWP. A near riot broke out and the non-union staff let the premises prior to the vote taking place. The members voted to reject the Council's offer. An internal complaint under the City's Workplace Violence policy was filed by the CANUE group on behalf of the non-union staff alleging that they had been improperly required to place themselves in danger by having to go to distribute the RTWPs. As a result of an anonymous complaint, the Ministry of Labour also became involved.

RETURN TO WORK PROTOCOL

56. Make sure you have an agreed-upon RTWP before the union members vote on the tentative settlement. As you can see above, the lack of one delayed Windsor's settlement for another week and also caused a minor delay in the vote in the Toronto strike.

57. The RTWP should contain clear agreement on return to work issues including but not limited to:

- when and on what shift employees are to return to work
- when employees on approved leaves of absence and sick leaves are to return
- how seniority will be affected by the strike
- the ability for employees to buy pension contributions that were missed
- payment by the unions for benefits that were carried on
- extension of grievance time limits
- vacation entitlements and timing
- whether requests to pay out vacation time rather than take time off will be approved and pursuant to what criteria (note that depletion of an employee's vacation below the 2 week minimum of the *Employment Standards Act* must be pre-approved by the Director of Employment Standards - section 41 of the *ESA*)
- what will happen with disciplinary action resulting from strike activity

- destruction of notes, videotapes, pictures of strike activity collected by all parties
- mutual indemnification.

PRESS ON REGARDLESS

58. During the course of the strike, non-union staff tried their best to carry on with special events. The Windsor Spitfires Junior Hockey Team (this year's Memorial Cup winners) playoff games were able to be held in the City's new Windsor Family Credit Union Centre, the Red Bull Air Races hosted by the City of Windsor and the Province of Ontario were a great success, the riverfront was cleaned up by non-union staff overnight after the annual fireworks display (attended by hundreds of thousands of Canadians and Americans) off barges in the Detroit River, Festival Epicure and Bluesfest 2009 went off without a hitch on our riverfront Festival Plaza, and at the end of the strike, with the co-operation of the unions who agreed not to picket, the Provincial Special Olympics, attended by hundreds of athletes, coaches and family was very successful.

THE RETURN TO WORK

59. Many employees were anxious to return to work, but were worried how management would treat them. Most City Hall departments felt that it was appropriate to hold special "back-to-work" events. Some had cake and coffee, others opted for pizza or some other "ice-breaker". These worked well to begin the process of healing after a long and difficult strike.