
The Taxation of Strike Pay

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PRÉCIS

En 1990, dans l'arrêt *Fries c. Sa Majesté la Reine*, la Cour suprême du Canada a confirmé comme question de droit la pratique administrative de longue date de caractériser les allocations de grève comme un revenu non imposable compte tenu du fait qu'elles ne sont pas « un revenu [...] dont la source » au sens de l'alinéa 3a) de la Loi de l'impôt sur le revenu. Aux États-Unis, par contre, les allocations de grève sont généralement assujetties à l'impôt sur le revenu, conformément à l'approche plus inclusive de la définition du revenu qui prévaut en vertu de l'article 61 de l'*Internal Revenue Code*. L'article examine en détail cette différence de politique fiscale. Dans le processus, les auteurs examinent la position d'autres pays devant des enjeux semblables, élaborent ce que l'on peut inférer à partir des conséquences fiscales et économiques probables de ne pas imposer les allocations de grève, et suggèrent certaines idées de réforme à l'intention des décideurs politiques canadiens.

ABSTRACT

The Supreme Court of Canada in 1990 in *Fries v. The Queen* confirmed as a legal matter the longstanding administrative practice of characterizing strike pay as a non-taxable receipt by virtue of its not being “income . . . from a source” pursuant to paragraph 3(a) of the Income Tax Act. By contrast, in the United States, strike pay is generally subject to income tax, consistent with the more inclusive approach to defining income that predominates under section 61 of the Internal Revenue Code. This article examines in detail this tax policy difference. In the process, it canvasses the attitude of some other countries to similar issues, maps out what can be inferred about the likely fiscal and economic consequences of not taxing strike pay, and suggests some ideas for reform for Canadian policy makers.

KEYWORDS: INCOME ■ LABOUR DISPUTES ■ STRIKES ■ TAX EXEMPTIONS ■ TAX POLICY ■ UNIONS

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INTRODUCTION

In New York City on September 15, 2004, Gary Bettman, the commissioner of the National Hockey League (NHL), announced a league-wide lockout¹ on account of stalled collective bargaining negotiations with the players' association (the NHLPA). On November 24, 2004, the NHLPA announced its intention to pay large monthly stipends to the locked-out players.² Following the announcement, the NHLPA advised its players that those who were subject to income tax in the United States would have to report the stipends as taxable income, but the stipends would not be subject to income tax in Canada.

The difference in tax policy between Canada and the United States in this regard is arresting. In Canada, a deduction from employment income is available for annual dues paid to unions. Unions themselves are tax-exempt organizations, so any investment income generated by funds diverted from annual dues for accumulation in a strike fund is tax-exempt. Finally, strike pay has been treated by Canadian revenue authorities as not being taxable. This view was explicitly upheld by the Supreme Court of Canada in 1990 in *Fries v. The Queen*,³ where the court decided that strike pay was not "income . . . from a source" within the meaning of paragraph 3(a) of the Income Tax Act.⁴ As a consequence, in Canada, amounts received as strike pay will

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- 1 The NHL work stoppage occurred because the employer prevented employees from working; thus, it was a lockout rather than a strike (a work stoppage where employees refuse to work). In this article, the term "strike pay" refers to any stipend or in-kind amount paid by a union to its members during a work stoppage (sometimes also called "lockout pay" or "picket pay").
 - 2 Strike pay in Canadian labour disputes is usually rather modest, ranging up to \$350 per week (see the discussion below under the heading "Data" and in the appendix). The stipend announced by the NHLPA was anomalously high, at US\$10,000 for each of the first two months with subsequent payments expected to range from US\$5,000 to US\$10,000 per month.
 - 3 90 DTC 6662; [1990] 2 CTC 439 (SCC); rev'g. 89 DTC 5240; [1989] 1 CTC 471 (FCA).
 - 4 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the ITA").

flow tax-free from the employer (in the usual case) on behalf of the employee to the union, and then back from the union to the employee, without being subjected to income tax at any point. The treatment of strike pay is less generous south of the border. In the United States, union dues are eligible as miscellaneous deductions, but only if taxpayers itemize their deductions (instead of taking the standard deduction). As in Canada, unions typically do not have to pay income tax on investment income. The starkest difference is that in the United States, consistent with its more inclusive approach to defining income,⁵ strike pay has consistently been held to be subject to tax under section 61 of the Internal Revenue Code.⁶

The tax policy issues raised by strike pay appear not to have been previously addressed at any length, either in Canada or abroad.⁷ Accordingly, this article fills this gap in the literature. We begin by describing the tax rules in Canada for strike pay and examining some statutory interpretation issues surrounding the leading case in this area (*Fries*). This is followed by a comparison with the rules in other countries; reporting of key data, including strike pay amounts and forgone tax revenue; analysis of the economic effects; a review of the advantages and disadvantages of the main policy alternatives; and finally, our conclusion.

CANADIAN TAX TREATMENT OF UNION DUES, UNION INVESTMENT INCOME, AND STRIKE PAY

At first glance, it might seem that the issue of the tax treatment of strike pay is a binary question: “Is strike pay subject to tax or not?” However, to get a complete picture of the tax treatment of strike pay, it is necessary to consider the context in which strike pay is received. There are actually three distinct levels of analysis that are salient to setting out the tax treatment of payments from labour organizations to their members during labour disputes. At the first level of analysis is the issue of the deductibility of membership fees or union dues paid to labour organizations. At the second level, the tax status and treatment of the various activities of the labour organization itself—especially the aggregation, accumulation, and investment of funds held in reserve for use during potential labour disputes—is relevant. The final level of analysis is concerned with payments made by labour organizations for the support of workers who have been locked out or are on strike—that is, the tax consequences to the recipient of strike pay.

5 This broad approach was firmly established in 1955 by the United States Supreme Court in *Commissioner v. Glenshaw Glass Co.*, 348 US 426 (1955). Warren CJ remarked, *ibid.*, at 429-30, “Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature. And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted.”

6 Internal Revenue Code of 1986, as amended (herein referred to as “the IRC”).

7 The most detailed account appears to be a paragraph in Jonathan R. Kesselman, “Base Reforms and Rate Cuts for a Revitalized Personal Tax” (1999) vol. 47, no. 2 *Canadian Tax Journal* 210-41, at 223.

Generally speaking, “annual dues” paid by an officer or an employee to an eligible “trade union” are deductible from the taxpayer’s income from the office or employment unless the payments can be more accurately considered to be payments made for some non-union purpose (such as establishing or supporting a superannuation fund), for the provision of insurance, or for any purpose not related to the union’s ordinary operating expenses.⁸ Annual dues paid to an eligible trade union are not deductible if the officer or employee has been (or will be) reimbursed by his or her employer for the fees⁹ or if the fees constitute an initiation fee associated with joining the union rather than annual dues necessary to maintain membership.¹⁰

In order to be considered an eligible “trade union,” an organization must satisfy the definition of “trade union” in section 3 of the Canada Labour Code¹¹ or the definition in any provincial labour relations legislation. Section 3 of the CLC defines “trade union” as “any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees.” Substantially similar definitions of “union” and/or “trade union” can be found in provincial legislation addressing labour relations.¹²

With regard to the requirement that the dues paid to the union be “annual dues,” Canadian courts have analyzed the meaning of the term on a number of occasions.¹³ The relevant case law makes it clear that the term “annual dues” has been treated as rather porous by the courts. While contributions earmarked specifically for use in a strike fund or for certain specific pension or similar benefits will not generally be deductible, in cases where there is no such earmarking, Canadian courts appear to be willing to consider contributions to unions to be “annual dues.”

Moving on to the second stage of the analysis, unions are generally considered to be exempt organizations under paragraph 149(1)(k) of the ITA. Ostensibly similar in motivation to the general deductibility of union dues paid by officers and employees, paragraph 149(1)(k) provides that amounts received by a union qua labour

8 ITA subparagraphs 8(1)(i)(iv) and (v), and subsection 8(5) secure this result. See also *Interpretation Bulletin* IT-103R, “Dues Paid to a Union or to a Parity or Advisory Committee,” November 4, 1988.

9 IT-103R, *supra* note 8, at paragraph 3.

10 See *Burke v. The Queen*, 76 DTC 6075 (FCTD).

11 RSC 1985, c. L-2, as amended (herein referred to as “the CLC”).

12 For example, section 1(1) of the Ontario Labour Relations Act, 1995, SO 1995, c. 1, schedule A, defines “trade union” as “an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.” Similarly, section 1(x) of Alberta’s Labour Relations Code, RSA 2000, c. L-1, as amended, defines “trade union” as “an organization of employees that has a written constitution, rules or bylaws and has as one of its objects the regulation of relations between employers and employees.”

13 See, for example, *Burke*, *supra* note 10; *Lucas v. MNR*, 84 DTC 1628 (TCC); and *Hummel v. The Queen*, [1997] 2 CTC 2791 (TCC).

organization will not be taxable. The position of the Canada Revenue Agency (CRA) is that labour organizations do not have to file for status or register in any particular way in order to be exempt; that is, the provision is self-assessing. The CRA stated in a technical interpretation issued on September 10, 2001 that whether a particular entity constitutes a labour organization in any given year is a question of fact to be determined from year to year on the basis of the entity's activities.¹⁴ Relevant, though not dispositive, in the view of the CRA is the list of organizations contained in the "Directory of Labour Organizations in Canada" maintained by Human Resources Development Canada.¹⁵

The tax advantages extend also to the third and most visible level of analysis: the tax treatment of strike pay itself. On May 5, 1989, in a judgment that would ultimately be overturned by the Supreme Court of Canada, the Federal Court of Appeal in *Fries*¹⁶ held that \$880.80 received by Wally Fries in strike pay from the Saskatchewan Government Employees' Union was taxable as "income . . . from a source" under paragraph 3(a) of the ITA, and therefore should have been reported as income by Fries. In this respect, the Federal Court of Appeal upheld the assessment of the minister, who had gone against established administrative practice in arguing that the strike pay was taxable as income, probably because Fries was on a sympathy strike and the strike pay was much higher than normal. In fact, the strike pay received was intended to provide full after-tax wage replacement. Fries applied for leave to appeal to the Supreme Court of Canada. The Supreme Court unanimously allowed the appeal, reversing the judgment of the Federal Court of Appeal. In what is almost certainly the shortest Supreme Court of Canada judgment to reverse a judgment of the Federal Court of Appeal in a tax case, Sopinka J rendered the court's reasons—which are reproduced in full in the following excerpt—from the bench:

We are not satisfied that the payments by way of strike pay in this case come within the definition of "income . . . from a source" within the meaning of s. 3 of the *Income Tax Act*. In these circumstances the benefit of the doubt must go to the taxpayers. The appeal is therefore allowed and the decision of the Tax Review Board is restored. The appellants are to have their costs throughout.¹⁷

14 CRA document no. 2001-009077, September 10, 2001.

15 See Human Resources Development Canada, "Directory of Labour Organizations in Canada" (online: http://www110.hrdc-drhc.gc.ca/millieudetravail_workplace/ot_lo/index.cfm/doc/english). The NHLPA is listed as a labour organization in the directory.

16 *Supra* note 3.

17 *Fries*, *supra* note 3, at 6662; 439 (SCC). Judgments from the bench are infrequent but not uncommon at the Supreme Court of Canada. However, there are two things that make the judgment in *Fries* stand out: first, the court tends to provide more detailed reasons in tax cases; and second, judgments from the bench are usually reserved for cases in which an appeal is being dismissed, not allowed. The reversal of a decision of the Federal Court of Appeal so swiftly and with so little fanfare is remarkable.

The Supreme Court's judgment in the case has been criticized for its brevity and the reluctance of the court to engage with or analyze the proper approach to construing paragraph 3(a) of the ITA. For example, Krishna remarks that "the Supreme Court bypassed the fundamental issue: should section 3 be read expansively on a global, or narrowly on a schedular, basis."¹⁸ Similarly, Hogg, Magee, and Li state, "In a surprisingly brief judgment on an issue of fundamental importance, the Court did not analyze whether strike pay had the character of income and the fact that a union had an obligation to make payments to its members on strike."¹⁹

In our view, it is indeed unfortunate that the court did not provide a detailed analysis of the reference to "income . . . from a source" in paragraph 3(a) of the ITA. Not only did the court bypass an opportunity to engage with the appropriate interpretation of the provision; it also failed to undertake a meaningful analysis of the decision of the Federal Court of Appeal, which disallowed the taxpayer's argument that the \$880.80 payment was merely a return of income, on the basis that the funds had been commingled and held in a common fund. In addition, in our view, the Supreme Court should have addressed the fact that union members' contributions of union dues had already benefited from deductibility and that investment returns of the strike fund were exempt from tax. In choosing not to provide substantial reasons, the court appears to have ignored the cautionary words of Urie J at the Federal Court of Appeal, who wrote with respect to the importance of the case:

The parties hereto have agreed that, despite the small amount involved, this appeal is an important one since it is a test case for a substantial number of other potential appellants whose appeals from assessments of income tax arising from largely similar facts, depend on the outcome of the appeal.²⁰

The decision is all the more lamentable given its cursory analysis and problematic return to supposedly bygone methods of statutory interpretation. According to Duff,

[w]hile statutory interpretation cannot proceed without background norms and assumptions, these norms and assumptions should reflect the values of the society of which they are a part, not those of a bygone era. For this reason, a residual presumption in favour of the taxpayer, a lingering legacy of strict construction, is perhaps less convincing than a residual presumption in favour of political accountability and democratic decision making. . . . In *Fries v. The Queen*, . . . where the taxpayer argued successfully that strike pay was not income from an unspecified source within the meaning of paragraph 3(a) of the Act, such a presumption would have favoured the Crown, requiring labour unions and their members to justify a special exemption for strike pay notwithstanding that union dues are deductible in computing a taxpayer's

18 Vern Krishna, *The Fundamentals of Canadian Income Tax*, 8th ed. (Toronto: Carswell, 2004), 133.

19 Peter W. Hogg, Joanne E. Magee, and Jinyan Li, *Principles of Canadian Income Tax Law*, 5th ed. (Toronto: Carswell, 2005), 84.

20 *Fries*, supra note 3, at 5240; 471 (FCA).

employment income and the investment income that accumulates in a union's strike fund is tax-exempt.²¹

Thus, the decision may also demonstrate how the Supreme Court of Canada almost immediately began drifting away from the so-called modern approach to the interpretation of the ITA (the approach emphasized in the court's judgment in *Stubart Investments Limited v. The Queen*)²² in favour of the more traditional strict approach, pursuant to which failure to enumerate a source of income within the ITA leads almost inexorably to a judgment in favour of the taxpayer.²³

Whatever its limitations in terms of the apparent lack of analytical depth and rigour of expression, as well as suspect statutory interpretation, the Supreme Court's judgment in *Fries* did not actually change established administrative practice. Prior to the judgment in *Fries*, the CRA's administrative position, as set out in *Interpretation Bulletin* IT-334R, had been to consider strike pay not to be income to recipients, unless it had been received from the union as contractual remuneration for services rather than strike pay per se.

Payments Received by Union Members

3. Financial assistance paid by a union to its members during the course of a strike is not necessarily income of the member for the purposes of the Act. Such amounts, when received by a member, will be taxable if they are received as a consequence of the member being an employee of the union. Where union members receive funds that originated, or will originate, from the operation of a business by the union, the amounts will be treated as income subject to tax regardless of whether or not the receiving members participated in the business activity. Similarly, any amounts are taxable which are received by a taxpayer who is employed by or a consultant to a union, either permanently or as a member of a temporary committee, or who has withdrawn his services from his employer and has agreed to provide services, pursuant to an employment contract, to the union.²⁴

It bears noting that interpretation bulletins are not—and do not purport to be—dispositive with regard to legal issues. Rather, interpretation bulletins attempt to outline the CRA's interpretation of the law, which is not binding on the courts. Interpretation bulletins do not even commit the minister to assessing taxpayers in a particular way,²⁵ though it is the CRA's practice to do so.

21 David G. Duff, "Interpreting the Income Tax Act—Part 2: Toward a Pragmatic Approach" (1999) vol. 47, no. 4 *Canadian Tax Journal* 741-98, at 784 (citations omitted).

22 84 DTC 6305; [1984] CTC 294 (SCC).

23 Similar approaches have been applied in other cases, with similar results. See, for example, *Schwartz v. The Queen*, 96 DTC 6103; [1996] 1 CTC 303 (SCC); *Manrell v. The Queen*, 2002 DTC 1222; [2002] 1 CTC 2543 (TCC); and *Fortino et al. v. The Queen*, 97 DTC 55; [1997] 2 CTC 2184 (TCC); aff'd. 2000 DTC 6060; [2000] 1 CTC 349 (FCA).

24 *Interpretation Bulletin* IT-334R, "Miscellaneous Receipts," July 30, 1982, paragraph 3 (quoted by the Federal Court of Appeal in *Fries*, supra note 3, at 5242; 474).

25 See, for example, *Nowegjick v. The Queen et al.*, 83 DTC 5041; [1983] CTC 20 (SCC).

In the wake of the Supreme Court's decision in *Fries*, *Interpretation Bulletin* IT-334R was revised and reissued as IT-334R2, with little change in administrative practice:

Union Members Assistance

12. A member of a union who is on strike or locked out need not include in income payments of the type commonly referred to as "strike pay" that are received from his or her union, even if the member performs picketing duties as a requirement of membership. In the decision of the Supreme Court of Canada in *Wally Fries v. The Queen*, [1990] 2 CTC 439, 90 DTC 6662, payments by way of strike pay were held not to be "income from a source." On the other hand, payments made by a union to its members for services performed during the course of a strike are included in income if the member is employed by or is a consultant to the union whether permanently, as a member of a temporary committee or in some other capacity. Regular salary, wages and benefits received by employees of unions are subject to tax in the usual manner.²⁶

IT-334R2 is still the most current interpretation bulletin on the strike pay issue, and is unambiguously correct as a legal matter, pending something further from Parliament or from the Supreme Court of Canada to disturb the judgment of the court in *Fries*.

The preceding discussion has focused on federal income taxes, since the income taxes imposed by all provinces except Quebec share the tax base of the ITA. The story in the context of the provincial income tax in Quebec, however, is largely the same. A tax credit is available for

- union dues;
- dues paid to the Commission de la construction du Québec;
- dues paid to the Association professionnelle des chauffeurs de taxi du Québec;
- dues paid to a recognized artistic association or a professional association whose purpose is to maintain a professional status recognized by law.²⁷

Non-profit organizations such as trade unions are exempt from income taxes in Quebec.²⁸ And again, mirroring the treatment of the federal income tax, strike pay is not included in income for Quebec income tax purposes.²⁹

26 *Interpretation Bulletin* IT-334R2, "Miscellaneous Receipts," February 21, 1991.

27 Revenu Québec, "Guide to the Income Tax Return (Electronic Version)," line 373, "Union, Professional or Other Dues" (online: http://www.revenu.gouv.qc.ca/eng/pub_form/guides/tp1g/aideligne/ligne373.asp?sect=lign). See also the Quebec Taxation Act, RSQ, c. I-3, section 752.0.18.3.

28 Quebec Taxation Act, section 996: "A club, society or association, established and operated exclusively for non-profit purposes, that, in the Minister's opinion, is not a charity, is exempt from tax."

29 "In general, any amount that is earned, whatever its source, constitutes income. . . . Do not include the following when calculating your income: . . . strike pay." See Revenu Québec, "Income" (online: <http://www.revenu.gouv.qc.ca/eng/particulier/impots/revenus.asp>).

COMPARISON WITH OTHER COUNTRIES

Canadian rules for each of the three aspects described above—the deductibility of union dues, the taxation of investment income of unions, and the taxation of strike pay itself—may be compared with similar rules in the United States, the United Kingdom, New Zealand, and Australia. Attempts to broaden the comparative survey were frustrated by the fact that the taxation of strike pay is rarely addressed with explicit statutory provisions.³⁰ Table 1, which provides a summary of the findings, shows that Australia joins Canada in both allowing a deduction for union dues and not taxing strike pay, while other countries either provide no deduction for union dues (the United Kingdom and New Zealand) or tax strike pay (the United States).

Australia

The Australian approach to the deductibility of union dues and the taxation of strike pay has been addressed in a pair of taxation rulings issued by the Australian Taxation Office (ATO) in April 2002. The first of these rulings deals with the deductibility of payments by union members to strike funds.³¹ The second addresses whether payments from strike funds received by workers during a labour dispute are assessable to tax.³² With regard to the deductibility of contributions to strike funds, the ATO has drawn a distinction (similar to the one drawn in Canada) between ordinary union membership fees, which are generally deductible, and special strike fund levies, which are not deductible. The ATO states, “A payment of a levy to a strike fund will only be incurred in gaining or producing the contributor’s assessable income where the strike fund is used to maintain or improve the contributor’s pay.”³³ The ATO explains in a footnote that contributions to strike funds are not deductible on the basis that “[w]e have been advised by a leading trade union that strike funds are not established for [the] purpose [of maintaining or improving the contributor’s pay].”³⁴

Trade unions located in Australia that operate principally in Australia are considered to be tax-exempt organizations. However, the tax exemption does not apply to income earned by an otherwise tax-exempt trade union from any superannuation, life insurance, or accident and disability insurance business it carries on.³⁵

30 The lack of such provisions makes one wonder whether strike pay is uncommon in some of these other countries.

31 Australian Tax Office, *Taxation Ruling* 2002/7, “Income Tax: Deductibility of Payments to Strike Funds,” April 24, 2002.

32 Australian Taxation Office, *Taxation Ruling* 2002/8, “Income Tax: Assessability of Payments Received from Strike Funds,” April 24, 2002.

33 TR 2002/7, *supra* note 31, at paragraph 8.

34 *Ibid.*, at note 2.

35 Australian Taxation Office, “Is Your Organisation Exempt from Income Tax? Income Tax Guide for Non-Profit Organisations” (online: <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/34269.htm>).

TABLE 1 Tax Treatment of Union Dues, Investment Activities, and Strike Pay

	Union dues	Investment activities	Strike pay
Canada	Deductible if “annual dues”	Generally exempt	Always exempt
Australia	Deductible unless a strike fund levy	Generally exempt	Exempt unless periodic and expected
United States	Deductible as itemized deduction	Generally exempt	Taxable unless a gift
United Kingdom	Not deductible unless paid to a listed organization ^a	Taxable	Always exempt
New Zealand	Not deductible	Taxable	Probably exempt

^a Few (if any) trade unions are listed.

The ATO takes the position that payments from strike funds to union members during labour disputes are not assessable income. In the ATO’s opinion, union members have no right or entitlement to the payment, and because the payment is made on the basis of financial hardship, strike pay does not satisfy the ordinary understanding of income. More specifically, the ATO explains that striking or locked-out union members will generally have “no expectation of receiving regular, fixed payments from the strike fund.”³⁶ However, if for some reason a member does have “an expectation of receiving regular, fixed payments from the strike fund, and is accordingly able to rely on the payments for his or her regular expenditure, the payments will be assessable income.”³⁷

United States

The IRC allows for the deductibility of union dues as a miscellaneous itemized deduction pursuant to section 67. However, taxpayers who choose to itemize their deductions have to forgo the standard deduction. Ordinarily, only miscellaneous deductions cumulatively exceeding 2 percent of a taxpayer’s adjusted gross income may be taken.³⁸ Thus, for those who pay union dues but take the standard deduction instead of itemizing their deductions, there is no explicit allowance made for the deductibility of union dues. A significant proportion of unionized workers take only the standard deduction. Analysis of data contained in the Current Population Survey

36 TR 2002/8, *supra* note 32, at paragraph 6.

37 *Ibid.*, at paragraph 7.

38 There are some types of miscellaneous deductions that are not subject to the 2 percent rule.

(CPS)³⁹ and tax statistics produced by the Internal Revenue Service (IRS)⁴⁰ shows that more than 40 percent of households with at least one unionized employee take the standardized deduction. This number is substantially lower than the percentage of households where there are no unionized employees. In households without a unionized member, approximately 70 percent of taxpayers take the standardized deduction.⁴¹

Labour organizations are considered to be tax-exempt by virtue of section 501(c)(5) of the IRC.⁴² According to the IRS, to be a labour organization for the purposes of section 501(c)(5), a particular entity has to be

1. an association of workers
2. who have combined to protect or promote the interests of the members
3. by bargaining collectively with their employers
4. to secure better working conditions, wages, and similar benefits.

A special-purpose labour organization not controlled by private individuals⁴³ and created for the purpose of operating a strike or lockout fund has been held by the IRS to satisfy the four prongs of this test, since strike pay provided directly to members furthers a “union’s primary purpose of representing its members in matters of wages, hours of labor, working conditions, and economic benefits.”⁴⁴ Although any income

39 United States, Bureau of Labor Statistics and the Bureau of the Census, “Current Population Survey” (online: <http://www.bls.census.gov/cps/>).

40 Internal Revenue Service, Statistics of Income Division, “SOI Tax Stats—Individual Statistical Tables by Adjusted Gross Income” (online: <http://www.irs.gov/taxstats/indtaxstats/article/0,,id=96981,00.html>).

41 Statistics for the distribution of gross income for unionized and non-unionized households from the CPS were compared with statistics for the type of deduction taken among taxpayers in different income brackets. The data are from 2001, the most recent available year. The results show that approximately 57.8 percent of households with one unionized employee itemized their deductions, compared with 28.1 percent of non-unionized households. There are three important caveats to these findings. First, the CPS data use only household income. The IRS data include all returns (couples filing jointly, separately, etc.). However, when IRS data for joint filings only are examined, no significant changes result. Second, the IRS data include only those returns reporting at least \$1 of gross income. The CPS data include households with reported income of zero. Third, the IRS data include numerous brackets for gross income levels above \$75,000. However, in order to coincide with the CPS data, these brackets were combined and a weighted average taken. As a result, the data on unionized employees are likely skewed, because it is probable that a larger proportion of unionized households would fall in the lower end of this bracket compared with the general population.

42 For an extended treatment of IRC section 501(c)(5), see John Francis Reilly, Carter C. Hull, and Barbara A. Braig Allen, *IRC 501(c)(5) Organizations*, Exempt Organizations—Technical Instruction Program for FY 2003 (Washington, DC: Internal Revenue Service, 2003) (online: <http://www.irs.gov/pub/irs-tege/eotopicj03.pdf>).

43 For details, see Rev. rul. 76-420, 1976-2 CB 153.

44 Rev. rul. 67-7, 1967-1 CB 137.

accruing to labour organizations is generally considered tax-exempt, section 501(c)(5) entities must still report and remit taxes on “unrelated business income.” In keeping with a section 501(c)(5) entity’s tax-exempt status, investment income generated by the labour organization and used to support its ends is generally non-taxable.

The definition of “gross income” in section 61(a) of the IRC states, “Except as otherwise provided in this subtitle, gross income means all income from whatever source derived.” The provision then lists examples of specific amounts included in gross income, refers to sections 71 and following as provisions detailing specific inclusions, and refers to sections 101 and following as provisions detailing specific exclusions. Strike pay is not explicitly mentioned anywhere in the IRC. However, the broad interpretation that the United States Supreme Court has given to the phrase “gross income means all income from whatever source derived,” in cases like *Glenshaw Glass*,⁴⁵ has been applied by lower courts to include strike and lockout benefits. The primary taxpayer argument in the reported US case law on strike pay tends to be that the strike pay was gratuitous—that is, a gift⁴⁶—and should therefore be excluded from gross income on the basis of section 102(1) of the IRC, a provision that expressly excludes gifts and inheritances from gross income. Since the question whether a particular transfer of property is a gift is a question of fact that turns on whether the transferor was motivated to act out of “detached and disinterested generosity,” it is perhaps not surprising that some courts have characterized strike pay as a gift in certain circumstances.⁴⁷ However, it is more commonly held that strike pay is not a gift.⁴⁸ In the 1975 case of *Madonna J. Cokwell*,⁴⁹ the Tax Court enunciated six relevant factors for determining whether strike pay should be considered a gift. These factors⁵⁰ include

1. whether there was a moral or legal obligation to make the payments;
2. whether the payments were made upon a consideration of the recipient’s financial need;
3. whether the benefits would continue during the strike if the recipient worked elsewhere;

45 Supra note 5.

46 The United States Supreme Court addressed the definition of “gift” in *Commissioner v. Duberstein*, 363 US 278 (1960).

47 The most prominent of the decisions holding that strike pay amounted to a gift was rendered by the United States Supreme Court in *United States v. Kaiser*, 363 US 299 (1960). It should be noted that the court in *Kaiser* was constrained by the jury’s finding at trial that the assistance was rendered to a class of persons in the community in economic need and that the strike pay was motivated primarily by generosity or charity. Another case that considered whether strike pay was a gift under the test articulated in *Duberstein* was *Stone v. Lynch*, 325 SE 2d 230 (1985), where the North Carolina Supreme Court concluded that the strike pay in question was properly considered a gift for the purposes of North Carolina income taxation.

48 See, for example, *Richard A. Osborne*, 69 TCM 1895 (1995).

49 64 TC 584 (1975).

50 As described in *Osborne*, supra note 48, at 1901.

4. whether the recipient was a member of the striking union;
5. whether the payments required the recipient to perform any strike duties such as picketing, or to what extent the recipient was under a moral obligation to picket; and
6. whether there were any restrictions, such as whether the benefits were restricted to basic necessities, or whether the recipient had unfettered control over use of the funds.

United Kingdom

In the United Kingdom, annual subscription fees paid to specifically approved organizations are deductible from employment income under section 344 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA).⁵¹ A current list of approved organizations is maintained by HM Revenue & Customs (HMRC, formerly Inland Revenue) and is available for public perusal on the Internet.⁵² While the statutory framework seems to suggest that trade unions might be able to gain HMRC approval, few (if any) trade unions appear on the approved organizations list. The current list is dominated by professional organizations, such as various societies and organizations for academics, accountants, actuaries, architects, engineers, lawyers, medical professionals, psychiatrists, psychologists, scientists, etc.

Historically, trade unions and employees' associations have been explicitly exempted from income taxation—for example, by section 467 of the Income and Corporation Taxes Act 1988 (ICTA).⁵³ However, trade unions are generally considered to be companies for the purposes of the corporate tax.⁵⁴ Under certain conditions, registered trade unions can claim relief from corporate tax in respect of certain non-trading income and chargeable gains used to make provident benefits available to members.⁵⁵ Registered trade unions are listed pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992 or the Industrial Relations (Northern Ireland) Order 1992.⁵⁶ In practice, most trade unions are registered under one of these acts.

51 Income Tax (Earnings and Pensions) Act 2003 (UK), 2003, c. 1. See United Kingdom, HM Revenue & Customs, "EIM32900—Other Expenses: Professional Fees and Subscriptions: Annual Subscriptions to Approved Bodies" (online: <http://www.hmrc.gov.uk/manuals/eimanual/EIM32900.htm>).

52 The list is available for download from HM Revenue & Customs at <http://www.hmrc.gov.uk/list3/list3.pdf>.

53 Income and Corporations Taxes Act 1988 (UK), 1988, c. 1.

54 United Kingdom, HM Revenue & Customs, "CT4710—Trade Unions" (online: <http://www.hmrc.gov.uk/manuals/ct123manual/ct4710.htm>).

55 United Kingdom, HM Revenue & Customs, "CT4711—Trade Unions: Provident Benefits—Title to and Extent of Relief" (online: <http://www.hmrc.gov.uk/manuals/ct123manual/ct4711.htm>).

56 Trade Union and Labour Relations (Consolidation) Act 1992 (UK), 1992, c. 52 and Industrial Relations (Northern Ireland) Order 1992, Statutory Instrument 1992 no. 807. See CT4710, *supra* note 54.

Strike pay is not subject to tax in the United Kingdom. According to HMRC, section 19(1) of the ICTA (which has been superseded by the ITEPA) did not extend to the inclusion of strike pay in income. “Some Trade Unions make payments to members who are on strike. Such payments are not emoluments from the employment and are not taxable.”⁵⁷ Apparently the ITEPA has introduced no substantive changes to the law regarding the taxation of strike pay.

Although strike pay is not directly subject to tax, it is indirectly taxable because it is counted as income for the purpose of the income-tested working tax credit.⁵⁸ This is unlike the situation in Canada, where strike pay is neither directly taxable nor counted as income in calculating the Canada child tax benefit and the goods and services tax credit.

New Zealand

In New Zealand, union dues are considered an employment-related expense. The Income Tax Act 2004 contains the following “employment limitation” rule in respect of the deduction of employment-related expenses: “A person is denied a deduction for an amount of expenditure or loss to the extent to which it is incurred in deriving income from employment.”⁵⁹ There is no specific provision that overrides this general provision to authorize a deduction for union dues.

As unincorporated associations, trade unions in New Zealand are generally taxed as individuals under the Income Tax Act 2004, and therefore are assessable to tax on income attributable to the investment of union funds.

New Zealand’s approach to the taxation of strike pay is not perfectly clear, but amounts received as strike pay are likely not assessable. In order to be assessable, strike pay would have to be characterized as “income” according to the applicable test. Section CA 1(2) of the Income Tax Act 2004 provides that in addition to amounts specified in the legislation as income, a receipt will be considered income generally if it is “income under ordinary concepts.” To be characterized as income under “ordinary concepts,” strike pay would have to be received regularly (for example, weekly or bi-weekly) and be expected. However, if the payment was a lump sum or if the union made in-kind provision for strikers, the “ordinary concepts” requirement would probably not be satisfied. A further argument against these payments being considered income, according to “ordinary concepts,” is that the union is returning union dues paid by its members. Given that employees are not allowed a deduction for union dues *ex ante*, it is not unlikely that this argument would be decisive.

57 United Kingdom, HM Revenue & Customs, “SE06500—Emoluments of Employees and Office Holders: Strike Pay from Trade Unions” (online: <http://www.hmrc.gov.uk/manuals/senew/SE06500.htm>).

58 Chartered Institute of Taxation, “New Tax Credits: Q and A with Inland Revenue” (online: <http://www.tax.org.uk/showarticle.pl?id=1780>).

59 New Zealand Income Tax Act 2004, 2004 no. 35, as amended, section DA 2(4).

DATA

Since our ultimate goal is to address alternatives to current Canadian tax policy on strike pay, the above legal analysis needs to be supplemented with data on strike pay amounts and the revenue cost of the current Canadian tax treatment of strike pay.

Strike pay is generally concerned with providing workers and their families with day-to-day sustenance over the course of a given labour dispute. Strike pay is not usually concerned with income replacement as such. In the absence of comprehensive current data on strike pay, we may cite some recent individual figures, ranging from \$40 to \$350 per week: the Canadian Auto Workers Union pays \$150 per week, escalating to \$200 after the fourth week;⁶⁰ the Canadian Union of Public Employees pays \$200 per week, starting on the tenth day of the strike, although individual divisions or locals may supplement this amount;⁶¹ the Canadian Media Guild pays US\$200, escalating to US\$300 after the fourth week;⁶² the United Food & Commercial Workers Union pays at least \$240 starting the second week of a strike, with the objective of paying at least 40 percent of pre-strike earnings;⁶³ the Communications, Energy and Paperworkers Union of Canada pays \$250 per week (which it said was the highest in Canada), although this elevated rate does not generally apply until the fourth week of a labour dispute;⁶⁴ and the BC Teachers Federation paid \$350 per week in the 2005 strike.⁶⁵

The federal revenue cost (tax expenditure amount) of the non-taxation of strike pay has not been officially estimated since 1992, when it was calculated in the government of Canada's tax expenditure reports to be \$9 million.⁶⁶ However, by

60 Canadian Auto Workers Union, "MUSA Survey: Updated CAW Responses" (online: <http://www.caw.ca/jointheCAW/campaigns/musa/survey.asp>).

61 Canadian Union of Public Employees, "Support to Members on Strike," September 23, 2003 (online: <http://cupe.ca/www/nationalstrikefundcampaigns/5977>).

62 Canadian Media Guild, "Negotiations" (online: <http://www.cmg.ca/cbcnegsstrikepayEN.html>).

63 United Food & Commercial Workers Union Local 247, "Information Notice," May 1, 2003 (online: http://ufcw247.com/global_news_template.cfm?page=05012003144453).

64 See CEP National Union, "Information for All CEP Members" (apparently written in May 2004) (online: <http://www.cep1129.ca/cepNews/Dues%20Increase.htm>); and CEP National Union, "Policy 614: CEP Defense Fund Rules and Strike Authorization Procedures" (online: http://www.cep.ca/policies/policy_614_e.pdf), paragraph 7.3.

65 CBC News, "B.C. Teachers Face Loss of Strike Pay but No Fine," October 13, 2005 (online: <http://www.cbc.ca/story/canada/national/2005/10/13/strike-bc-teachers051013.html>).

66 Canada, Department of Finance, *Government of Canada Tax Expenditures 1995* (Ottawa: Department of Finance, 1996), 24. These figures were calculated by the Department of Finance with reference to Statistics Canada's annual reports on part II of the Corporations and Labour Unions Return Act (CALURA) (Statistics Canada catalogue no. 71-202). Statistics Canada stopped collecting the CALURA information series in 1995. From 1997 onward, Statistics Canada has collected information similar to that collected under part II of CALURA using a redesigned monthly "Labour Force Survey"; however, the redesigned survey does not collect strike pay information.

examining the relationship of 1988-1992 tax expenditures to workdays lost owing to strikes and lockouts in that period, post-1992 federal tax expenditure amounts can be estimated from post-1992 figures for workdays lost. Provincial tax expenditures can then be estimated from the relationship of federal to provincial revenues. For full details, see the appendix to this article.

The second and third columns of table 2 provide the results of this analysis. The average combined federal-provincial tax expenditures relating to strike pay are in the range of \$15-25 million in 2005 dollars, of which approximately 60 percent is the revenue forgone by the federal government and the remaining 40 percent by all the provincial governments combined.

For any given year, the estimates of the strike pay tax expenditures are apt to be somewhat unreliable because of the large year-to-year variation in workdays lost owing to strikes and lockouts. The first column of table 2 shows that workdays lost may be almost doubled or halved from one year to the next.

There is also considerable variation by country in the reported frequency and duration of labour disputes, partly for methodological reasons relating to the way the data are collected, but also for various social, cultural, and economic reasons.⁶⁷ According to statistics compiled by the International Labour Organization, Canada witnessed a total of 266 strikes and lockouts in 2003, involving almost 80,000 workers. These interruptions accounted for a cumulative loss of 1.74 million days of work.⁶⁸ By way of comparison, in the United States in 2003, there were 14 strikes or lockouts lasting at least one day or shift and involving more than 1,000 workers, leading to 4.08 million lost work days.⁶⁹ In 2003, the United Kingdom lost 499,100 days of work from 133 strikes and lockouts, and Australia lost 439,400 days from 643 work stoppages.⁷⁰

ECONOMIC EFFECTS

In considering whether to tax strike pay, one would like to know the broader economic effects, including whom the current exemption benefits or harms, and to what degree. Although detailed modelling and empirical examination of these factors are well beyond the scope of this commentary, a few remarks indicating the state of knowledge in this area may be useful.

67 Variations attributed to social and cultural reasons should not be given undue weight, however, since recent empirical work suggests that there is considerable interdependence in strike activity among OECD countries. See L.J. Perry and Patrick J. Wilson, "An Analysis of International Linkages in Strike Activity" (2003) vol. 11, no. 2 *International Journal of Employment Studies* 47-74.

68 These figures somewhat underestimate the actual number of work stoppages and workers involved, since they include only stoppages lasting for at least half of a workday and resulting in the cumulative loss of 10 or more days of work. Complete statistics are available through the International Labour Organization Laborsta Database (online: <http://laborsta.ilo.org/>).

69 US data on smaller-scale work stoppages are not available.

70 Statistics from the International Labour Organization Laborsta Database, *supra* note 68.

TABLE 2 Estimate of Strike Pay Tax Expenditures

Year	Workdays lost owing to strikes and lockouts (millions)	Estimated combined federal-provincial tax expenditures (millions of 1992 dollars)	Estimated combined federal-provincial tax expenditures (millions of 2005 dollars)
1993	1.52	9	11
1994	1.61	10	12
1995	1.58	9	11
1996	3.35	20	26
1997	3.61	21	27
1998	2.44	14	18
1999	2.45	15	20
2000	1.66	10	12
2001	2.2	13	17
2002	3.03	18	23
2003	1.74	10	12
2004	3.3	20	25

Source: See the appendix to this article.

It should be relatively uncontroversial to suggest that the non-taxation of strike pay is advantageous to organized labour. Since the non-taxation of strike pay decreases the funds necessary to provide a given level of support to union members, unions have the option of collecting dues at a lower rate; or, for a given level of dues collected, they will see the effective value of their strike funds increase, be able to maintain strike benefits for a longer period of time, and be able to threaten strikes more credibly. The effect ought to be a marginal increase in the bargaining power of labour unions vis-à-vis management and decreased strike costs to unions.

A more significant question is whether taxing strike pay would decrease strike activity, as suggested by Kesselman.⁷¹ Generally, theory would support this prediction.⁷² The seminal modern economic treatment of why strikes (and lockouts)

71 “Broadening the tax base to include strike pay would also tend to reduce the incentive for unions to strike or to prolong strikes; whether this is a positive or negative effect hinges on judgments that go beyond the ordinary criteria for tax policy”: Kesselman, *supra* note 7, at 223.

72 For a recent review of this literature, see Michele Campolieti, Robert Hebdon, and Douglas Hyatt, “Strike Incidence and Strike Duration: Some New Evidence from Ontario” (2005) vol. 58, no. 4 *Industrial & Labor Relations Review* 610-30. One can imagine an economic model that would yield the opposite prediction. Consider a period in which strike pay goes from being taxable to being non-taxable. Unions may react to this development by increasing their reliance on strikes, since these are now less costly in net terms and unions may be able to sustain strikes longer. Consequently, the union may be in a position to demand more from management. However, given that the employer is aware of this change in relative bargaining position, the employer may be expected to moderate its demands. In the case where information is imperfect, the employer might even overcompensate the union for its windfall in bargaining power. This suggests that introducing the non-taxation of strike pay would merely redistribute

occur comes from Hicks, who postulated that work stoppages are a result of faulty assessments of costs and benefits by both sides; that is, strikes are the product of mutual mistakes and are therefore generally wasteful.⁷³ This model and more recent economic models⁷⁴ predict that “if a certain factor or variable increases the cost to only one of the parties . . . incidence and duration are reduced even though the cost of strikes is higher for one party, since the cost to that party is a component of the total cost to both parties.”⁷⁵ A government move to tax strike pay would constitute exactly such a cost increase. Also, in one of the few works to consider the issue of strike pay directly, Goerke developed a theoretical model indicating that the availability of strike pay will generally increase the incidence of strikes.⁷⁶ On the other hand, the effects of taxing strike pay are less clear in behavioural models on strikes, which focus on non-economic variables.⁷⁷

Although no empirical work has examined the effects of strike pay taxation on strike activity, the basic idea that an increase in costs to one party decreases strike activity has been tested in the context of whether providing employment insurance benefits (unemployment insurance in the United States) to strikers increases strike activity. The evidence is decidedly mixed. Hutchens, Lipsky, and Stern have found a positive correlation between strike activity and the availability of government employment insurance programs (which would presumably decrease strike costs);

wealth between the two parties—that is, unions would receive a bigger part of the pie—but that an increased preference for strikes on the part of unions may be compensated for by a countervailing decreased preference for strikes on the part of employers.

73 John R. Hicks, *The Theory of Wages* (London: MacMillan, 1932), and John R. Hicks, *The Theory of Wages*, 2d ed. (New York: St. Martin's Press, 1966), specifically 136-57. Kaufman has noted that “Hicks's theory has come to dominate economic theorizing on strikes”: Bruce E. Kaufman, “Research on Strike Models and Outcomes in the 1980s: Accomplishments and Shortcomings,” in David Lewin, Olivia S. Mitchell, and Peter D. Sherer, eds., *Research Frontiers in Industrial Relations and Human Resources* (Madison, WI: Industrial Relations Research Associations, 1992), 77-83, at 82.

74 These include asymmetric information models (in which unions differentiate between firms by forcing them to choose between labour concessions and strikes, on the theory that firms that are highly profitable are likely to be more willing to make such concessions) and joint cost models (in which the greater the joint costs of a strike, the greater is the incentive to compromise to avoid the expenses associated with a work interruption).

75 Morley Gunderson, Allen Ponak, and Daphne G. Taras, *Union-Management Relations in Canada*, 4th ed. (Toronto: Addison-Wesley Longman, 2001), 331.

76 Laszlo Goerke, “Strike Pay and Employers' Strike Insurance” (2000) vol. 51, no. 3 *Metroeconomica* 284-303.

77 See John Godard, “Strikes as Collective Voice: A Behavioral Analysis of Strike Activity” (1992) vol. 46, no. 1 *Industrial & Labor Relations Review* 161-75. Godard argues that strikes should be regarded as, primarily, the exercise of collective voice and an expression of worker discontent. Using data from 1980-81, Godard finds that managerial practices, operations size, product market structure, and union politics, among other factors, significantly influenced days lost owing to strike activity.

but a number of researchers, most notably Maki, Ahmed, and Ingram, Metcalf, and Wadsworth, have failed to confirm this finding.⁷⁸

The broadest economic question is whether the non-taxation of strike pay improves bargaining outcomes for unions, and further, whether this increases societal welfare. Clearly this is unlikely to be resolved any time soon, as the broad question of the effect of unions on the economy is very much in debate. In a review of the literature in this area, Kuhn concludes only that the social welfare impact of unionization is uncertain, and that allocative inefficiencies caused by a wage wedge or strikes are unlikely to cost more than a quarter percentage point of gross domestic product.⁷⁹ Similarly, Benjamin, Gunderson, and Riddell note that “evidence on the average economy-wide impact is inconclusive.”⁸⁰

If there is a conclusion to be drawn from a review of the economic literature, it is that although the non-taxation of strike pay is at least marginally a benefit to organized labour, the benefit is emphatically small, the direct effects of increased union bargaining power on the incidence and duration of strikes are unclear, and the broader overall effects on social welfare are uncertain.

ANALYSIS OF POLICY ALTERNATIVES

On horizontal equity grounds, strike pay should be taxable. As Kesselman notes,

not only is strike pay a receipt indirectly related to employment services, it is also financed out of employees' tax-deductible union dues. Hence, it is inconsistent with both horizontal equity and the tax deductibility of union dues to omit strike pay from taxable income.⁸¹

Similarly, considerations of economic efficiency would argue for taxing strike pay, since the current non-taxation may be inducing unions to pay larger amounts of strike pay than they otherwise would.⁸² Arguments for a deliberate incentive, such

78 See Robert M. Hutchens, David B. Lipsky, and Robert N. Stern, *Strikers and Subsidies: The Influence of Government Transfer Programs on Strike Activity* (Kalamazoo, MI: Upjohn Institute for Employment Research, 1989); Robert M. Hutchens, David B. Lipsky, and Robert N. Stern, “Unemployment Insurance and Strikes” (1992) vol. 13 *Journal of Labor Research* 337-54; D.R. Maki, “The Effect of the Cost of Strike Activity on the Volume of Strike Activity” (1986) vol. 39, no. 4 *Industrial & Labor Relations Review* 552-63; Syed M. Ahmed, “The Effects of the Joint Cost of Strikes in Canadian Manufacturing Industries—A Test of the Reder-Neumann-Kennan Theory” (1989) vol. 21, no. 10 *Applied Economics* 1353-67; and Peter Ingram, David Metcalf, and Jonathan Wadsworth, “Strike Incidence in British Manufacturing in the 1980s” (1993) vol. 46, no. 4 *Industrial & Labor Relations Review* 704-17.

79 Peter Kuhn, “Unions and the Economy: What We Know; What We Should Know” (1998) vol. 31, no. 5 *Canadian Journal of Economics* 1033-56.

80 Dwayne Benjamin, Morley Gunderson, and W. Craig Riddell, *Labour Market Economics*, 5th ed. (Toronto: McGraw-Hill Ryerson, 2002), 495.

81 Kesselman, *supra* note 7, at 223.

82 Kesselman, *ibid.*, at 238, table 6, cites economic efficiency as an additional reason to tax strike pay.

as the externality reasons given for subsidizing research and development or Canadian films, would appear to be absent in this context. Even the Department of Finance seems unable to find a reason for the current policy; the listing of goals of tax expenditures in the annual tax expenditure accounts does not refer to any goal justifying the non-taxation of strike pay, but simply restates the legal conclusion reached in *Fries* that strike pay is not “income . . . from a source.”⁸³

One argument that could be advanced for not taxing strike pay is vertical equity. Strike pay undoubtedly is mainly received by low- and middle-income taxpayers.⁸⁴ Also, although practices of different unions vary, it is common for strike pay to be determined on the basis of a formula that gauges need rather than income replacement or an equal amount per member. For example, the strike pay in some cases will be larger for people with children to support, or for those people who have not been able to find part-time jobs. In that respect, strike pay could be said to be closer to a distribution of benefits or “gifts” than “income.”⁸⁵ There is some support for this position in US jurisprudence and in the opinions of the Australian tax authorities, as described above.⁸⁶

One difficulty with the vertical equity argument is that not all strike pay is need-based. For example, the facts of the *Fries* case suggested full income replacement; and during the recent NHL labour dispute, the NHLPA made large stipend payments of up to US\$10,000 per month to its players. Unfortunately, there appear to be no data to determine where on this continuum between need-based payments and income replacement most strike pay falls. More fundamentally, however, exempting particular types of income runs counter to horizontal equity and efficiency goals of the tax system, and there exist redistribution mechanisms, such as increasing the basic exemption, that do not have these drawbacks.⁸⁷

83 At least one writer has described this explanation as “puzzling.” See Alan Macnaughton, Current Tax Reading feature (1998) vol. 46, no. 4 *Canadian Tax Journal* 929-39, at 930-31.

84 Kesselman, *supra* note 7, at 221.

85 This observation could be used to support a legal argument for non-taxation of strike pay, either on the basis of characterizing strike pay as social assistance and effectively exempt under paragraph 110(1)(f) of the ITA, or on the grounds that strike pay is closer to the sustenance pole and not “income . . . from a source.”

86 The criteria from *Colwell*, *supra* note 49 and the accompanying text, are helpful in determining where any given set of facts is apt to be on the continuum. The need end of the continuum also supports the conclusion of the ATO that strike pay will not ordinarily be assessable because it is not “income.” See *supra* note 36 and the accompanying text.

87 Kesselman, *supra* note 7, at 221, notes this problem for strike pay and observes that it also occurs with exclusions from the tax base for government cash transfer payments and employer-paid health benefits. Also, Steven Shavell and Louis Kaplow of Harvard Law School have argued in favour of redistributing through the income tax rather than directly regulating in a way that inefficiently seeks to promote distributive justice. Put simply, the idea is to promote efficiency—that is, maximize the size of the pie—and only then to split up the pie using the income tax. See Louis Kaplow and Steven Shavell, “Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income” (1994) vol. 23, no. 2 *The Journal of Legal Studies* 667-81.

A second argument for not taxing strike pay is the increase in compliance costs that taxation would produce. There are several reasons: many unions are not set up to produce tax slips for large numbers of people; some payments are in-kind and have valuation problems; the amount of taxable income per worker could be quite small; and, since strikes are infrequent for any one union local, there might not be much opportunity for reduction of compliance costs through learning. Hence, the additional compliance costs faced by unions might represent an unacceptable proportion of the associated tax revenues. One source has suggested that if strike pay were to become taxable, the outcry would be at least as much for the compliance burden as for the increased amount of tax payable. However, unions already generally withhold and remit income tax for employees on their payroll, and presumably could similarly withhold tax from payments to striking workers with some efficacy.

If strike pay is to be taxed, some practical issues need to be addressed. In particular, unions sometimes pay employers or insurance companies for the continuation of employment benefits, such as health and dental plans or life insurance, for the duration of the strike. Presumably, such payments should be non-taxable, just as they would be if the employer had paid the amounts. Similarly, where employment benefits are disrupted by a strike, payments by a union in lieu of death benefits from employer-provided life insurance might also be appropriately exempted since they would replace non-taxable amounts. Finally, special strike levies, which currently are non-deductible because they are not “annual dues,” should become deductible to avoid double taxation.⁸⁸

One alternative to taxation of strike pay is to address the problem on the front end. More specifically, there might be a reduced deduction available for union dues based on the proportion of union dues paid into strike funds *ex ante*. The idea is that just as special strike levies are not deductible, the proportion of annual dues that makes its way into strike funds should also be non-deductible. This non-deductible proportion could be calculated on a union-by-union and year-by-year basis (with a one- or two-year lag); but for simplicity, a better option would be to create a Canada-wide non-deductible proportion based on the average proportion of annual dues contributed to strike funds, which might be in the neighbourhood of 5 percent.⁸⁹ Professional fees, which are also deductible, would presumably retain a full deduction since no professions maintain strike funds. This front-end approach is attractive in that it solves the compliance cost problem. However, it creates the wrong incentives in that a Canada-wide non-deductible proportion could not affect individual unions’ decisions on strike pay, and hence strike pay would not be taxable at the margin.

88 See the cases cited in note 13, *supra*.

89 One estimate of this number is the ratio of the federal tax expenditure for strike pay (say, \$12 million) to the tax expenditure for union and professional dues (\$585 million for 2004), which is 2 percent. However, this is too low because the denominator inappropriately includes professional dues.

A second alternative is to follow the approach of Finland, which exempts the first €16 (approximately \$22)⁹⁰ received in strike pay per day. Strike pay above this level is included in income.⁹¹ A similar policy in Canada would exempt the first \$150 of strike pay per week. This would exempt most strike pay, which seldom exceeds \$250 per week. The special adjustments required for the full taxation of strike pay might not be necessary, because it would apply in only a very limited number of situations. This approach would solve the compliance cost problem since only a few people would have a taxable amount. However, it might not be perceived as solving the vertical equity problem. The \$150 per week exemption translates into \$7,800 per year, which is less than the basic personal amount. Also, taxation above the exempt amount would raise very little revenue, and the horizontal equity and efficiency problems noted above would not be solved for most strike pay amounts.

Although this is not a tax issue, a government contemplating the taxation of strike pay might wish to consider the change in the context of the overall role of the state in labour disputes. Comparing Canada and the United States, the United States taxes strike pay, while Canada does not; but Canadian employment insurance rules deny benefits to workers taking part in any type of labour dispute,⁹² while US unemployment insurance rules in many states provide benefits to workers taking part in certain kinds of labour disputes, such as lockouts.⁹³ Hence, a move to tax strike pay in Canada might be seen as removing a benefit that compensates for the less favourable treatment of employment insurance.

CONCLUSION

The tax treatment of union dues, labour organizations, and strike pay in Canada raises both horizontal equity and efficiency concerns, since it provides a mechanism through which employment income can return to union members without incurring income tax liability. The United States, the United Kingdom, and New Zealand have adopted considerably less generous approaches to the implicated tax policy issues than Canada, although Australia has similar rules. Our analysis indicates that the annual tax expenditures in this country are currently in the neighbourhood of \$15 million to \$25 million per year, with about 60 percent attributable to federal tax expenditures and the remaining 40 percent to tax expenditures at the provincial

90 Converted at €1 = \$1.36647, the reported exchange rate at <http://www.xe.com/> on November 27, 2005.

91 See Finland, Ministry of Finance, *Taxation in Finland 2001* (Helsinki: Ministry of Finance, 2001), 25 (online: <http://www.vm.fi/tiedostot/pdf/fi/15626.pdf>). In 2001, the amount exempted was €12. It has since been increased to €16.

92 Employment Insurance Act, SC 1996, c. 23, as amended, section 36. See the judicial interpretations of this section provided by the Office of the Umpire (online: http://www.ei-ae.gc.ca/en/umpire/jud_interpretations/labour_1.shtml).

93 See Hutchens et al., *supra* note 78, and Gillian Lester, "Unemployment Insurance and Wealth Redistribution" (2001) vol. 49, no. 1 *UCLA Law Review* 335-93, at 350, note 56.

level. Admittedly, taxing strike pay raises vertical equity concerns in that these payments are received mostly by low- and middle-income people. Compliance costs are also an issue, because a large number of people could be taxed on small amounts. Hence, the alternatives of partially denying the deductibility of union dues or taxing only strike pay amounts above a threshold deserve serious consideration.

APPENDIX ESTIMATING STRIKE PAY TAX EXPENDITURES FOR 1993 TO 2004

The official federal tax expenditure estimates are presented in the table below. The unofficial estimates are our own. They are based on figures from the *Labour Force Historical Review 2004*⁹⁴ relating to the number of days lost owing to labour disputes in each province, the ratio of provincial to federal income tax revenues, and the federal tax expenditure estimates of the Department of Finance.⁹⁵

A straightforward way to marshal the information in the table, in order to better estimate the missing federal tax expenditure figures for 1993 to 2004, is to calculate an average federal tax expenditure per lost workday for 1988 to 1992 (\$5.92 in 1992 dollars), convert this into current dollars, and then multiply by the current number of lost workdays. The corresponding provincial expenditures are estimated in the same way. The results of this procedure are reported in table 2 in the main body of the article.

One validity check on the data is to calculate the implied average strike pay. A \$5.92 tax expenditure per lost workday implies \$21.14 in strike pay per day, assuming a 28 percent average marginal tax rate. Adjusting this for inflation and multiplying by 5 produces average weekly strike pay of \$136 in 2005 dollars. If 10 to 30 percent of unions do not issue strike pay, the true average of positive strike pay amounts approximates \$150 to \$195 per week. These figures seem reasonable as compared with the individual union figures cited in the “Data” section of the article, particularly if it is assumed that lower strike pay amounts are less likely to be publicized and so are not included in this list.

94 Statistics Canada, *Labour Force Historical Review 2004* (CD-ROM database), Statistics Canada catalogue no. 71F0004XCB. While these statistics vary in magnitude from the Laborsta data, the trends are similar.

95 Tax revenue data gathered from Karin Treff and David B. Perry, *Finances of the Nation 2004* (Toronto: Canadian Tax Foundation, 2004), chapter 3. The revenues utilized are from the 2002 taxation year. It is assumed that there has been no significant change in the ratio of provincial tax revenues to federal tax revenues within a province since the early 1990s.

Days Lost Owing to Labour Disputes and Estimated Strike Pay Tax Expenditures

Year ^a	Days lost owing to labour disputes (millions)	Official federal tax expenditures (millions of nominal dollars)	Estimated combined federal-provincial tax expenditures (millions of 1992 dollars)
1979	7.83	6	22
1980	8.98	7	23
1981	8.88	8	22
1982	5.8	5	12
1983	4.44	4	10
1988	4.9	7	14
1989	3.7	13	24
1990	5.08	18	31
1991	2.52	12	19
1992	2.11	9	14

^a Official estimates are not available for years prior to 1979 or for 1984-87.

Sources: Data on days lost from the International Labour Organization Laborsta Database (online: <http://laborsta.ilo.org/>), table 9C, ISIC rev. 3. Tax loss figures from Canada, Department of Finance calculations: 1979-1983, Canada, Department of Finance, *Account of the Cost of Selective Tax Measures* (Ottawa: Department of Finance, August 1985), 42; 1988-1989, Canada, Department of Finance, *Government of Canada Personal Income Tax Expenditures* (Ottawa: Department of Finance, December 1992), 11; 1989-1991, Canada, Department of Finance, *Personal and Corporate Income Tax Expenditures* (Ottawa: Department of Finance, December 1993), 15; 1992, *Government of Canada Tax Expenditures 1995* (Ottawa: Department of Finance, 1996), 24. Provincial tax expenditures based on data from the *Labour Force Historical Review 2004* (CD-ROM database), Statistics Canada catalogue no. 71F0004XCB; and Karin Treff and Ted Cook, *Finances of the Nation 1995* (Toronto: Canadian Tax Foundation, 1995), 3:3, table 3.3. Quebec provincial income tax revenue from Québec, Ministère des Finances, 1998-1999 Budget, Budget Plan, March 31, 1998, 29, table 2.15; federal income tax revenue for Quebec from Karin Treff and David B. Perry, *Finances of the Nation 1997* (Toronto: Canadian Tax Foundation, 1997), 3:3, table 3.3. Inflation data from the "Consumer Price Index" published by Statistics Canada on behalf of the Bank of Canada (online: <http://www.bankofcanada.ca/en/cpi.html>). Estimated total provincial tax expenditures are based on 1992 data, except for Quebec, which uses 1994 data.