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EXECUTIVE SUMMARY

The Canadian Chamber of Commerce is the nation's largest and most representative business association. We speak for over 170,000 small, medium and large firms of every type, as well as 90 business and professional associations. Our members are most concerned that the Government of Canada is contemplating a process of hasty, one-sided labour reform to restrict the right of employers to maintain operations during a strike. This process is particularly objectionable when a thorough review of the *Canada Labour Code* is already underway. Our first objection, therefore, is that such major change would be contemplated without proper study and consultation.

Secondly, we submit that the proposed reform is misguided and without merit. Four fundamental objections are developed in this document.

- **The unique nature of the federal sector has been disregarded.**

Federal sector businesses are, by definition, interprovincial, national or international in scope. Federal sector businesses include many large, integrated networks spread across great distances, connected by air, rail, road or technology. Federal sector businesses constitute the infrastructure of the Canadian economy and include many essential services for which alternate sources of supply do not exist.

The unique nature of the federal sector means that the proposed reform cannot safely be borrowed from the provincial jurisdiction. Flaws identified in provincial replacement worker legislation would be compounded in the federal sector, with hazardous consequences to the Canadian economy. The impact of railway or roadway transportation services being interrupted in the automotive sector is analyzed by way of example.

- **The disruptive impact of the proposal on the collective bargaining system.**

The employer's equivalent economic weapon to the strike is not the lockout but the ability to take a strike. This principle has been recognized by neutral commentators from the Woods Report of 1968 to Professor Paul Weiler of Harvard Law School today.

The proposed amendment is no more than an attempt by trade unions to bolster their power at the bargaining table. A ban on replacement workers creates a one-sided bargaining system in which a union can choose to shut down and inflict loss on the employer indefinitely, regardless of the reasonableness of its demands. The fact that such a legislative goal is acceptable to provincial governments aligned with the labour movement does not mean that the national government should embark on this dangerous path.

Under such a tilted collective bargaining system, it is predictable that Canadian business would become less competitive; strike incidence and duration would increase; and investment and reinvestment in Canada would be lost. Each of these adverse impacts is documented.

Ontario Labour Relations Board ("OLRB") decisions under the replacement worker provisions recently enacted in Ontario, are summarized in order to establish that this reform has very little to do with the use of so-called "scabs". In fact, the employer's ability to use managers and existing, non-bargaining unit employees to operate is severely restricted and the parties become embroiled in petty disputes over who is and who is not eligible to work. Problems of this sort would be magnified at the federal level with its preponderance of large bargaining units that span the entire country.

• Adverse impact on Canadian competitiveness.

Besides creating a direct incentive for employers to seek more secure sources of production elsewhere, legislation restricting the employer's ability to operate creates a generally unfavourable climate for business and foreign investment. In an era of global mobility of investment, jurisdictions are assessed by potential investors and reinvestors on many factors, with labour laws of significant concern.

The federal government's investment strategy is designed to promote Canada as a profitable site for business with a sophisticated and efficient infrastructure. The proposed reform threatens this strategy in two specific ways. First, a restriction on employers' bargaining power will affect the ability of Canadian business to meet global competitive pressures and achieve necessary workplace adjustments at the bargaining table. Second, disruption of the national infrastructure is predictable through increased strike incidence and duration, and the fact that each strike by each bargaining unit, no matter how small, will have the potential to shut down the federal sector employer's entire operation.

The Ogilvie Mills dispute in Montreal and the Giant Gold Mine strike in Yellowknife, disputes reportedly prompting the proposed reform, are analyzed in terms of the relationship between a balanced collective bargaining system and competitiveness goals. The analysis demonstrates that it is unlikely that a ban on replacement workers would have altered developments in the disputes.

• Strikes, picket lines and violence.

A commonly offered justification for restricting the use of replacement workers is the prevention of violence in labour disputes. This justification is shown to be unsupported by fact.

The potential for violence is inherent in the picket line, particularly mass picketing. The discipline and control of the picket line by the union is the primary method of violence prevention and, it is argued, trade unions should be held accountable in this regard.

There is no evidence that violence is in fact significantly related to the use of replacement workers. When employer efforts to operate are associated with picket line violence, it is because picketers are engaged in unlawful picketing and attempting to obstruct access to the employer's premises. Even with replacement worker legislation in place, it will still be necessary for persons and vehicles to cross picket lines and have access to the employer's premises. Removing the employer's right to do business during a strike is just further reinforcement of the union convention that picketers have a right to impede access to the struck premises - an unlawful purpose of the picket line.

Union regulation of the picket line, police enforcement of the law, and Canada Labour Relations Board ("CLRB") remedial authority to intervene in situations involving bargaining misconduct, are argued to be a sufficient and proper approach to violence prevention. While it is important to prevent violence where possible, the employer's lawful right to have access to its building and property and to protect its market share, customers and the survival of its business, indeed the survival of the jobs to which strikers will eventually return, cannot be viewed sensibly as a mere provocation to violence by strikers. The violence prevention rationale for reform is shown to be false and unprincipled.

INTRODUCTION

The Woods Report on Canadian Industrial Relations, 1969 stated that:

Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be, there is no viable substitute in a free society.¹

This statement remains a fundamental truth today. No system of collective bargaining can be considered perfect if the goal is to remove strife. Perhaps a system of compulsory arbitration or government regulation of wages and prices could better generate fairness, stability or industrial peace. However, this degree of intervention in a free society and market economy has never been seriously contemplated or considered desirable. It is, therefore, well to remember that the word "free" in the phrase free collective bargaining is not mere window-dressing.

Collective bargaining is a system which, paradoxically, resolves conflict through conflict. The strike is the primary tool for resolving impasses. The threat of a strike is generally sufficient to exert pressure on the parties to break deadlocks and create last minute compromise. Occasionally, the bargaining objectives of one party are so unacceptable to the other that resort to the economic weaponry of the strike or lockout is unavoidable. The existence of a small minority of prolonged labour disputes is not a reason to abandon the basic principles of collective bargaining.

Canadian industry has undergone massive restructuring in the last five years under irresistible competitive and economic pressures brought about by free trade, globalization, deregulation and recession. Collective bargaining is the process through which unionized employees must, in turn, deal with and bargain about the impact of these pressures. Canadian trade unions have found it necessary to bargain about layoffs and job security, wage concessions or freezes, and restrictive work practices. As painful as this process has been, it has been an inevitable development. Collective bargaining has provided an opportunity for self-determination to employees during this period of adjustment, through participation in the negotiation process. Further, collective bargaining has begun to prove that it can be responsive to change and create the conditions necessary to survive and compete in the global economy.

¹The Woods Report on Canadian Industrial Relations, 1969, p.2.

Canadian business and labour can deal with competitive pressures and consequent bargaining pressures if left alone to do so. It is critical, however, that government, whose free trade and privatization policies created much of the competitive pressure which continues to cause the massive restructuring of Canadian business, resist the political impulse to interfere with the collective bargaining system. Free trade and free collective bargaining go hand in hand. Government must not tie employers' hands in collective bargaining while pushing Canadian business into the ring of international competition.

The proper role of government in a collective bargaining system is two-fold: to facilitate the collective bargaining *process* without interfering in collective bargaining *outcomes*, and to protect the public interest. The present proposal of Human Resources Development Canada to restrict the right of federal sector employers to carry on operations during a strike, fails to either facilitate the collective bargaining process or protect the public interest. The proposed reform is in reality no more than an effort by the trade union movement to bolster its bargaining power through legislative amendment.

Although the precise content of the HRDC proposal remains under consideration, it appears that HRDC intends to borrow the following key features from provincial legislation:

- A requirement for a secret ballot vote supported by 60% of employees in the bargaining unit before the replacement worker provision would apply.
- A prohibition on the use of new hires or transfers, bargaining unit employees and managers from other locations.
- Allowance for the use of non-bargaining unit employees and managerial staff at the establishment, with their consent.
- Allowance for exemptions to prevent serious deterioration of machinery, equipment or premises or serious environmental damage.
- A requirement that services necessary to protect the public health, safety or welfare be maintained.
- Authority for the Canada Labour Relations Board to make determinations regarding the application or alleged violation of these provisions.

The Canadian Chamber of Commerce (the "Chamber") believes that this proposed reform is seriously flawed. The Chamber is the nation's largest and most representative business association, representing a total membership of over 170,000 small, medium and large firms from all sectors and regions of Canada. Chamber members ask, first and foremost, to be consulted about this proposed reform. They raise objections that such major change would even be contemplated by government without proper study and

consultation. Such a step would be particularly disturbing when a thorough review of the *Canada Labour Code* is already underway. Secondly, the Chamber asks that the merits of this proposal be examined with great care and submits that the proposed reform is misguided in several fundamental ways:

- I. The unique nature of the federal sector employer has been disregarded. The degree of overlap between employers covered by the *Canada Labour Code*, essential public services and the infrastructure of the Canadian economy, make the borrowing of proposed reform from the provincial sphere particularly inappropriate and imprudent;
- II. The impact of the proposal will be to disrupt the balance of power in the collective bargaining system, a questionable basis for labour reform;
- III. The proposed reform will have a significant adverse impact on the ability of federally-regulated employers, and those industries dependent on these national services to compete with consequent loss of jobs, and loss of investment and reinvestment; and
- IV. The offered justification of reducing picket line violence is unsupported by fact.

This submission will review the unique nature of federally-regulated industries and the public interest component inherent in the federal collective bargaining system. The damaging impact of one-sided reform on the federal collective bargaining system and on the Canadian economy will be clearly established. Although the onus of demonstrating the necessity of reform belongs with the advocates of change, this submission will also expose the offered justification of reducing picket line violence as false. Because it is understood that two particular labour disputes have prompted the HRDC proposal at this time, these disputes have been analyzed within the submission. The Ogilvie Mills dispute is discussed on page 34 of this paper, and the Giant Gold Mine dispute is discussed on page 35 of this paper.

The analysis in this submission will demonstrate that the HRDC's proposal is unsound, unnecessary and a threat to a viable collective bargaining process.

THE UNIQUE NATURE OF THE FEDERAL SECTOR EMPLOYER

In order to fall within federal jurisdiction and be regulated in labour relations matters by the *Canada Labour Code*, an employer's business must constitute a federal undertaking. Section 2 of the *Canada Labour Code* provides that federal undertakings include:

- navigation and shipping, both inland and maritime;
- railways, canals, telegraph or other works connecting any province with any other province or extending beyond the limits of a province;
- ferries or shiplines connecting any province with any other province or extending beyond the limits of a province;
- air transportation;
- radio broadcasting;
- banking; and
- works for the general advantage of Canada or two or more provinces.

The jurisdiction of the *Canada Labour Code* reflects the constitutional division of powers between the federal and provincial governments under the *Constitution Act, 1867*, formerly the *B.N.A. Act*). Responsibilities and powers are assigned between the federal and provincial governments on the basis of two broad principles:

The first is that matters that are interprovincial and international in scope should be assigned to the federal Parliament; matters that are essentially provincial or local in scope, or that can be best addressed by laws tailored to a particular provincial community should be assigned to provincial legislatures. The second is based on a rough distinction between those things that are rooted in communal and cultural differences, and for which the various provincial communities in Canada are likely to have quite different wants or needs, and those things that largely transcend cultural or social differences

and are likely to be of common interest to citizens throughout the country.²

Today the federal jurisdiction includes many activities not contemplated by the framers of the Canadian constitution, such as: telecommunications; trans-Canada pipelines; grain handling; atomic energy; fisheries; ports; postal and courier services; banking; and interprovincial trucking companies. These undertakings have been added to the federal jurisdiction rather than the provincial jurisdiction because they are international or interprovincial in scope and they are activities of inherently national concern.

Federal sector employers operate businesses which, by their nature, are concerns of Canada as a whole. Because of the interprovincial or national scope of federal undertakings, most of these operations are large, integrated networks spread across great distances, connected by air, rail, road, water or technology.

Federal undertakings correspond to a high degree with essential public services and constitute the infrastructure of the Canadian nation and economy. Federal sector businesses tend to be service-oriented, involved in the essential free flow of goods, services, capital and people across Canada. Often, the federal business is the only operation which provides those services to the country.

The essential nature of federal sector businesses to Canada is clearly recognized in section 90 of the *Canada Labour Code*, which stipulates that if a lawful strike or lockout which would "adversely affect the national interest" may commence during a period when Parliament is dissolved, the strike or lockout may be ordered deferred until Parliament is in session. This provision clearly contemplates that the business of the federal employer may be in the national interest, that a work stoppage may not be tolerable and that Parliament may be required to act with back-to-work legislation.

Indeed, history demonstrates that collective bargaining and the union's right to strike in the federal sector have often been restricted by the Parliament of Canada acting in the public interest. The following chart summarizes the federal government's frequent, and often expeditious, resort to back-to-work legislation in the last 20 years:

²*A Renewed Canada: The Report of the Special Joint Committee of the Senate and the House of Commons*, Supply and Services Canada, February 28, 1992, p. 62.

Back-To-Work Legislative Record

Employer Name Union Name	Location	Number of Workers	Number of Person-Days Lost	Start Date	Termination Date	Duration of Strike
Maritime Employers Association Longshoremen's Association	Halifax	650	35,280	August 8, 1976	October 23, 1976	77 days
Ministry of Transport Air Traffic Control Association	Canada-wide	2,200	6,600	August 7, 1977	August 10, 1977	4 days
Post Office Department Postal Workers	Canada-wide	21,503	144,580	October 16, 1978	October 26, 1978	11 days
Canadian Lake Carriers Association Marine Officers	Various provinces	780	4,460	October 16, 1978	October 24, 1978	9 days
B.C. Maritime Employers Association Longshoremen and Warehousemen	Vancouver	3,500	42,000	Oct. 19, 1982	Nov. 4, 1982	17 days
B.C. Maritime Employers Association Longshoremen and Warehousemen	Vancouver	4,280	29,960	October 6, 1986	November 18, 1986	44 days
Canadian National Railways and CP Rail Various unions	Canada-wide	48,660	173,790	August 24, 1987	August 29, 1987	6 days
Canada Post Corporation Postal Workers	Canada-wide	23,000	137,220	September 30, 1987	October 17, 1987	18 days
Prince Rupert Grain Ltd. Grainhandlers Union	Prince Rupert	69	2,120	December 9, 1987	January 21, 1988	44 days
Government of Canada (Ships' Cruise)	Canada-wide	2,300	53,000	November 11, 1989	December 16, 1989	36 days

Public Service Alliance						
Government of Canada (Hospital Services)	Canada-wide	1,350	15,420	November 30, 1989	December 16, 1989	17 days
Public Service Alliance						
British Columbia Terminal Elevator Operators' Association	Vancouver	600	3,000	June 10, 1991	June 15, 1991	6 days
British Columbia Government Employees Union						
Government of Canada Professional Institute	Canada-wide	6,000	27,370	August 30, 1991	October 3, 1991	35 days
Government of Canada	Canada-wide	68,000	689,210	September 5, 1991	October 3, 1991	29 days
Public Service Alliance						
Lakehead Terminal Elevators Association	Thunder Bay	700	4,500	October 3, 1991	October 12, 1991	10 days
Transportation- Communications International Union						
Canada Post Corporation	Canada-wide	40,831	5,730	October 29, 1991	October 29, 1991	1 day
Postal Workers						
British Columbia Maritime Employers' Association	British Columbia	3,500	32,500	January 27, 1994	February 10, 1994	15 days
Longshoremen and Warehousemen						

The extension of collective bargaining and the right to strike itself is modified by the public interest for many federal undertakings. For these employers, an interruption in operations raises grave national interest concerns, making it necessary for the government to monitor the bargaining situation closely with an eye to intervention. The unique nature and importance of the federal sector employer; the national scope and size of most federal undertakings; the degree of overlap with essential public services and the fact that federal sector businesses constitute the infrastructure of the Canadian nation and economy, should give the federal government pause in the wholesale borrowing of any labour reform created in the provincial jurisdiction.

Other federal sector employers may not be subject to a modified collective bargaining regime or a restricted right to strike, in the sense that a history of back-to-work legislation exists. Nevertheless, other federal employers may become candidates for such intervention if they are denied the right to maintain operations with existing forces or temporary replacements during a strike. For example, airlines; trucking; pipelines; banking; broadcasting; postal services; and telecommunications systems which today may be maintained in the face of a strike by using managers, non-striking employees, or replacement workers, may in future be shut down by a strike under the proposed ban on replacement workers. Inhibiting the federal sector employer's ability to maintain operations is, by definition, inhibiting the national economy from functioning. Ironically, limiting the ability of such employers to operate during a strike may lead to increased intervention by government through back-to-work legislation as services essential to the public and the economy are shut down.

It must also be noted that a multiplicity of bargaining units may exist in the large workforce of federal sector employers. The potential exists for one unit after another to shut down vast, integrated operations with repeated disruption of the national economy. Replacement worker legislation facilitates the ability of each bargaining unit - even small, specialized units such as mechanics - to shut down the employer's entire operation in a situation where re-deployment of supervisors and non-bargaining unit workers would avoid this result.

It is the essential nature of the federal sector employer to the Canadian economy and infrastructure which causes Chamber members who are not themselves covered by federal legislation, to object strenuously to this proposed reform. The potential impact of even a short disruption of many federal operations could be catastrophic to Canadian business and the Canadian economy as a whole.

It is not necessary for employers to instruct the federal government in the importance of the federal sector employer to Canadian competitiveness in the global economy. Federal government literature aimed at prospective international investors stresses the "sophisticated and efficient infrastructure" of the Canadian economy. For example, the government publication "Canada: A Bottom Line Investment Perspective" states as follows:

A 1993 report published by the World Economic Forum rates countries on several competitiveness criteria. Four of these criteria - roads, railroads, air transport and ports of access - deal with the adequacy and flexibility of transportation infrastructure relative to business requirements. Canada's average rating for these criteria was the highest among G-7 nations.

A comprehensive network of roads, ports, airports and rail lines provides fast and cost-effective freight and passenger services. Deregulation has

led to enhanced competition among alternative modes of transport. Rail, truck and air services are fully integrated with U.S. networks, providing efficient access to consumers and suppliers throughout North America.

The St. Lawrence Seaway system is a major inland water route into North America's heartland, serving ports over 2,200 km from the nearest coast. Canada's Atlantic and Pacific ports are major links to Europe and the Pacific Rim.

Convenient flights link business travellers with all major North American and global destinations, thanks to increased competition and the integration of North American air services. A variety of freight cargos can be accommodated and premium express services provide door-to-door delivery on the next business day for destinations in the U.S. and Mexico.

Canadian telecommunications suppliers have been investing heavily to provide the latest in fiberoptic technology and high-speed data transmission services, and the opening of the long distance market to increased competition will ensure that costs remain competitive. Calls to an overseas headquarters are often cheaper from Canada than from a comparable U.S. location.

For example, CANTAT-3, a high capacity trans-oceanic submarine fibre-optic cable, scheduled to be in service by December 1, 1994, will connect North America, northern Europe and points beyond. It uses the most advanced optical fibre technologies available to provide nearly four times the capacity of any previous transoceanic cable system. The unit cost of the CANTAT-3 cable system will be lower than any existing transatlantic cable network for all types of services: digital, voice, data, video, narrowband, wideband or broadband.

CANUS-1, the first undersea fiberoptic cable connection between Canada and the U.S., is expected to be put into service simultaneously and interconnected at the Canadian terminal.³

³The Investment Development Program (IDP) and its participating departments: Foreign Affairs and International Trade Canada, and Industry Canada - 1994, p.15.

Canada has committed itself to government policies which create a competitive environment, attract investment and create jobs. Canada's world-class transportation and communications infrastructure is recognized and promoted as a key ingredient to our success in the global economy. Labour reform designed to give trade unions the unilateral power to shut down federal sector operations would make Canada's "sophisticated and efficient infrastructure" vulnerable to constant disruption. Such reform would be a retrograde step and threaten Canada's economic strategy in world markets.

THE DISRUPTIVE IMPACT OF THE PROPOSAL ON THE COLLECTIVE BARGAINING SYSTEM

In a free collective bargaining system, the employer's countervailing economic weapon to the strike is not the lockout but the ability to take the strike. This fundamental principle was stated by the Woods Report as follows:

... The employer's economic sanction equivalent to the union's right to strike rarely is the lockout. It is his ability to take a strike ... However, it is important to note that an employer's capacity to take a strike depends largely on his right to stockpile goods in advance of the strike and to use other employees and replacements to perform work normally done by strikers. Together with the lockout, these possibilities constitute the employer's *quid pro quo* for the employees' right to strike; this is as it should be in our view.⁴

Collective bargaining is a system which uses controlled conflict to resolve the divergent interests of management and labour. The risk of resort to economic weaponry, that is the deliberate infliction of economic loss or damage, is tolerated by the parties and the public primarily because it is understood that actual resort to the strike will be rare and short-lived. In the vast majority of disputes, the threat of economic sanctions is sufficient to produce compromise and last-minute agreement. A system of collective bargaining that featured no such ultimate sanctions, no bargaining deadlines and no build-up of bargaining pressure would not produce compromise or a negotiated settlement.

The strike and the ability to take a strike must be seen as crucial countervailing forces in a system of mutual deterrence. As the parties negotiate to impasse, both are faced with significant risk if there is failure to agree. Removing or restricting an employer's ability to take a strike is like unilateral disarmament. The employer has significantly reduced bargaining power and significantly increased bargaining risk. The union has, conversely, decreased risk and increased bargaining power. The balance of power is disrupted and the collective bargaining system is destabilized. It is for this reason that the reform's impact is disturbing for 100% of employers in collective bargaining relationships, not the small minority that actually use replacement workers in a particular dispute. A ban on replacement workers creates a one-sided bargaining system in which one party can

⁴*The Report of the Task Force on Labour Relations*, Canadian Industrial Relations, Privy Council Office, 1968, p.176.

choose to shut down and inflict loss on the other indefinitely, regardless of the reasonableness of its demands.

Three results are predictable. First, under such a one-sided system, some agreements may be reached with more favourable result for the union as employers are forced to capitulate to union demands. However, if such settlements are unaffordable in fact, the long-term result will be damage to the business and competitiveness. Second, if the employer shuts down operations and continues to negotiate, the union, with an exaggerated sense of its true economic bargaining power thanks to labour law reform, may take longer to reach the necessary compromise, thus causing or prolonging strikes. Third, if the employer finds the union's demands to be unreasonable or unaffordable and refuses to agree, when the option of operating during the strike is removed, the option of transferring operations or shifting production out of the jurisdiction becomes more likely. It is, therefore, predictable that this one-sided tilting of the balance of power in collective bargaining would lead to less competitive businesses, an increase in strike incidence and duration, and loss of investment in the jurisdiction.

It should come as no surprise that, under such a one-sided bargaining system, strikes actually increase in frequency and duration. This has, in fact, been the experience in Quebec since 1977 when a ban on replacement workers was introduced. Despite a significantly smaller workforce, Quebec's strike record between 1978 and 1992 was worse than Ontario's in terms of the number of strikes, the number of employees involved and the number of days of production lost:

STRIKES, WORKERS INVOLVED AND TIME LOST IN QUEBEC AND ONTARIO		
1978 - 1992		
	Ontario	Quebec
Total number of strikes:	3,287	3,947
Total number of employees involved:	1,018,737	1,863,027
Total days lost:	23,124,840	23,789,407

Table 2 makes this point more clearly by adjusting the Quebec results to account for the fact that the Quebec workforce was roughly one-third smaller than the Ontario one throughout this period.

STRIKES, WORKERS INVOLVED AND TIME LOST IN QUEBEC AND ONTARIO ADJUSTED BY RELATIVE SIZE OF WORKFORCE		
1978 - 1992		
	Ontario	Quebec
Total number of strikes:	3,287	5,131
Total number of workers involved:	1,018,737	2,427,927
Total days lost:	23,124,840	30,926,227

Considered in this way, it can be seen that there were 1.6 times as many strikes in Quebec as in Ontario on a per capita basis; 2.4 times as many Quebec workers involved in strikes as Ontario ones; and 1.3 times as many days of production lost due to strikes in Quebec as compared to Ontario. While such differences are not likely to be solely attributable to replacement worker legislation, it is clear that the claim cannot be made that the Quebec system has resulted in a superior strike record.

An empirical study of the effects of Canadian labour legislation on the incidence and duration of strikes by Morley Gunderson concluded that anti-strike breaker legislation is statistically associated with "significant and quantitatively large *increases* on *both* strike incidence and duration and hence overall strike activity."⁵

In another major study of this subject, the authors found that:

Lastly, the prohibition on replacement workers increases both strike incidence and conditional duration, so it is associated with more strike activity rather than less ... The prohibition on the use of replacement workers does not reduce long-duration strikes, which is part of its original intent.⁶

⁵M. Gunderson, R. Melino and F. Reid, *The Effects of Canadian Labour Relations Legislation on Strike Incidence and Duration*, 1990, *Labour Law Journal*, August 512-518, at 517. Cf. the same conclusion in M. Gunderson, J. Kurvin and F. Reid: *The Effect of Labour Relations Legislation on Strike Incidence*, 1989, *Canadian Journal of Economics*, Volume XXII, 779-794, at 791.

⁶M. Gunderson, A. Melino: *The Effect of Public Policy on Strike Duration*, 1990, *Journal of Labour Economics*, Volume 8, 295-316, at 310.

While the evidence is necessarily anecdotal, Quebec employer representatives also report that production has moved out of Quebec to Ontario, the New England States and New York State as a result of this legislation. The employer faced with the possibility of a strike and an inability to operate naturally seeks to make alternate arrangements to supply customers and secure the business. Contracting out of bargaining unit work, relocation of operations, shifting production to other facilities, diverting investment and reinvestment out of the jurisdiction are all options the employer is forced to consider by such legislation. In short, the Quebec experiment has not promoted industrial stability, nor has it encouraged industrial growth.

When such adverse impacts are considered in the federal sector, there is even greater cause for concern than in the provincial jurisdiction. Because of the size of many federal sector bargaining units and the importance of federal employers to the infrastructure of the Canadian economy, the risk of increased strike incidence and duration, loss of competitiveness and loss of investment and reinvestment has a national dimension and is of national concern. The federal government's duty to protect the public interest should deter it from such reform.

The federal government's goal should not be simply to empower trade unions at the bargaining table without due regard for the consequences of reform. In our opinion, this was the result of the reforms of the three provincial governments aligned with the labour movement, which introduced similar labour reform in the provinces of Quebec, Ontario and British Columbia. Because provinces may experiment with one-sided labour reform, is no reason for the national government to travel the same path.

The borrowing of provincial legislation in the federal sector would also be problematic for a number of practical reasons. First, there is no possibility that an "emergency" exception designed to allow the use of specified replacement workers to prevent danger to life, health or safety, destruction or serious deterioration of employer property, or serious environmental damage, would be adequate to protect the public interest in the federal sector. Such provisions are intended for the extraordinary provincial business whose interruption would threaten the community. Provincial industry is not dominated by essential services and national networks which constitute the infrastructure of the Canadian economy.

Second, the categories of persons who are eligible to either work or not during a strike could not feasibly be imported into the federal sector. The Ontario legislation, for example, focuses on the geographic location of the strike and divides managers and non-bargaining unit employees into categories of eligible and ineligible based on their normal place of employment. The restriction focuses on the employer's ability to move managers and non-union employees to do work at the struck location. Applying such geographically based rules to large, national bargaining units and employer operations spread across the

country based on interprovincial movement of goods and people would be an administrative nightmare.

The reform proposal also raises a very pragmatic concern regarding the disruption of the collective bargaining system. An examination of Ontario Labour Relations Board cases which have been decided under the replacement worker provisions (sections 73.1 and 73.2 of the Ontario statute) reveals that the impact of these provisions is often petty intervention in the employer's efforts to operate with managers and existing non-bargaining unit employees. Not one case of new workers or so-called "scabs" being hired by a struck employer has come before the Board. Instead, arguments have centred on the new "rules of the game" and which specific persons are eligible to work.

The following chart illustrates this point:

ONTARIO STRIKE REPLACEMENT WORKER CASES		
Name of Case	Issue in Dispute	OLRB Decision
<i>The Great Atlantic & Pacific Company of Canada Ltd. v. UFCW, Locals 175 and 633 et al.</i> [1994] OLRB Rep. March 303 (McCormack)	Whether the employer was entitled to use its head office employees such as managers, a field merchandiser and a Health and Safety Director to perform some of the work of removing perishable food during a strike by the grocery store's employees.	No, the employer violated s.73.1 by using prohibited workers.
<i>Service Employees International Union, Local 204 and Local 532 v. The Canadian Red Cross Society Ontario Division et al.</i> [1994] OLRB Rep. January 34 (McCormack)	Whether the performance of bargaining unit work by other "allied" agencies violated the intent of the replacement worker provisions.	No, the struck work was not being performed by other agencies or employers acting on behalf of Red Cross but rather by competitors.
<i>International Alliance of Theatrical Stage, Employees and Moving Picture Operators, Local 357 v. Famous Players Inc.</i> , OLRB October 7, 1993 (MacDowell)	Whether the employer could use a manager transferred from another location during a strike.	No, the manager was working unlawfully during a strike contrary to s.73.1.
<i>International Alliance of Theatrical Stage, Employees and Moving Picture Operators, Local 357 v. Famous Players Inc.</i> [1993] OLRB Rep. December 1270 (MacDowell)	Whether the employer could transfer a manager to a struck location for the purpose of supervising an assistant manager who was eligible to work under s.73.1.	No, s.73.1 prohibited the transferred manager from supervising the assistant manager since the supervision of apprentice projectionists was bargaining unit work even though it was not normally done by the union

		members.
<i>International Alliance of Theatrical Stage, Employees and Moving Picture Operators, Local 357 v. Famous Players Inc.</i> [1994] OLRB Rep. Feb. 131 (Liang)	Whether the employer was entitled to use the services of an assistant manager who had moved from the struck location to another location for training and then returned to the struck location.	No, the assistant manager was no longer eligible to work as the employer had violated s.73.1(6) by transferring the assistant manager out of the struck location and in again.
<i>CUPE Local 229 v. Marriott Management Services</i> , [1994] OLRB Rep. June 729 (Howe)	Whether the employer was entitled to use the services of managers that had been hired to replace other managers who had left during the strike.	No, the employer had violated s.73.1 as the managers had been "hired" or "transferred" after notice to bargain was given, more than a year prior to the strike.
<i>International Union of Operating Engineers Local 772 v. Labatt's Ontario Breweries et al.</i> , [1994] OLRB Rep. June 704 (McCormack)	Whether Labatt's could use an engineer from a non-struck location to replace the striking engineers under the exception for specified replacement workers in s.73.2 for safety reasons.	No, although the employer was entitled to use the "emergency" exception in s.73.2, the employer already had two qualified managerial employees to keep the power plant operational and, therefore, the employer's request was denied.
<i>USW v. Nelson Quarry Company</i> , OLRB January 3, 1995 (Liang)	Whether the employer was entitled to use the services of independent contractor truck drivers during a strike by its employees which had lasted almost a year.	Yes, not a violation of s.73.1 since the independent brokers had done the same work prior to the strike but only to the extent that they were not performing the work of the striking bargaining unit truck drivers.
<i>OPSEU v. Modern Building Cleaning Inc. v. The Ontario Science Centre</i> , OLRB October 7, 1994 (Herman)	Whether the building owner, the Ontario Science Centre, was acting for the benefit of the contractor by having its managers perform some of the work of the striking cleaning contractor's employees.	No, not a violation of s.73.1 since the Ontario Science Centre managers were cleaning and picking up garbage on their own behalf.
<i>Marriott Corporation of Canada v. OPSEU v. Mohawk College</i> , OLRB November 29, 1994 (McCormack)	Whether the employer could use specified replacement workers under the exception in s.73.2 during a strike by cleaners.	No, the employer had sufficient managers to perform the work necessary to prevent the dangers to health and safety under s.73.2.

<i>IBEW Local 636 and Mississauga Hydro Electric Company</i> , OLRB October 28, 1994 (Surdykowski)	Whether an employer who locked out several bargaining unit employees by sending them home for wearing union solidarity t-shirts to work violated s.73.1.	Yes, as soon as one bargaining unit employee is locked-out the rest are prohibited from working.
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To fully appreciate the disruptive impact of Ontario's new replacement worker provisions on the collective bargaining dynamic and how far removed the actual restrictions on employer conduct are from the rationale of "anti-scab" legislation, it is worthwhile to review some of the above-noted OLRB decisions. Appendix "A" to this submission contains a review, in some detail, of the events surrounding five Ontario strikes which became the subject of OLRB proceedings: A&P, Red Cross, Famous Players, Marriott Management Services at Queen's University, and Labatts Ontario Breweries.

Not all untoward consequences of replacement worker legislation come before the OLRB. An example of objectionable bargaining behaviour made possible by replacement worker legislation occurred during a strike by the CAW, Local 112, at Toromont Industries Ltd. in Toronto between March 6 and July 8, 1994. During the strike by 150 mechanics and warehouse employees, the CAW approached Toromont's customers directly and offered to send out the striking workers to do required maintenance work. The CAW fax sent to Toromont's customers began "Dear valued customer" and went on to say "Our team of highly skilled and trained members are prepared to offer you their services during this dispute at very reasonable rates. These are the same people you have trusted and dealt with over the past years to repair your equipment. We thank you for your patience." The fax was signed by the bargaining committee.

A spokesman for the CAW was quoted in *The Financial Post*⁷ as follows: "If the employer were to replace our work while we're on strike, he'd be breaking the law, but we're replacing our own work. And we're offering more reasonable rates compared to the company." In fact, the CAW was offering mechanics at \$50 an hour compared to the \$79 an hour rate charged by Toromont to its customers. In other words, at a time when the company was prevented by law from replacing strikers or servicing its customers, the union was directly soliciting the employer's business, apparently with impunity. This unconscionable result is a strong indictment of this sort of legislation.

It is important to return to the fundamental point that interfering with the employer's ability to operate during a strike is wrong in principle. Academics and neutral commentators agree. Paul Weiler, a leading Canadian labour relations expert presently at Harvard Law School, has stated that he feels quite uncomfortable with the kind of one-

⁷ May 17, 1994

sided intervention provided in Quebec law. Professor Weiler does not believe that a prohibition on temporary replacements is appropriate for two reasons:

First, the employer's right to hire replacements to reduce the impact of a strike is, to a large extent, reciprocal to the employees' right to take other jobs in order to protect themselves against their loss of income. ...

(Second) Were we to bar the recruitment of replacements or the strikers taking on other jobs, the law would insulate the parties from outside competition. Such insulation runs very much against the grain of a market-based system of collective bargaining. ...⁸

Weiler offers this example: employees joining a union and commencing collective bargaining demand a wage increase from \$6 to \$9 per hour, the standard union rate. The employer offers \$7. If there is a ban on the employer hiring temporary replacements who would gladly work for \$7 an hour:

Such a rule in effect empowers the unionized employees unilaterally to fix a wage floor - \$9 per hour - that their employer must pay if it wishes to have the bargaining unit's work performed.⁹

Weiler believes that this result is unacceptable in a system of free collective bargaining. Well-known expert, University of Toronto Professor John Crispo, has also stated publicly that "I have always believed that management's right to operate is the *quid pro quo* for the right to strike."¹⁰

A text by five leading labour law experts, including H.W. Arthurs and D. Carter, says that the employer's right to "resort to the labour market in order to keep her/his plant running" during a strike is based on the assumption that "her/his ability to do so is in part a test of how realistic the wage proposals of labour and management are."¹¹ Of legislation refuting this assumption in Quebec, Ontario and B.C., the authors say "These `anti-scab'

⁸Weiler, Paul, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation*, Harvard Law Review, Vol. 98, 351, p.413.

⁹*Ibid*, p.414.

¹⁰Quoted in the *Ottawa Citizen*, November 16, 1991.

¹¹*Labour Law and Industrial Relations in Canada*, H.W. Arthurs, D.D. Carter, J. Fudge, H.J. Glasbeek, G. Trudeau, Butterworths Kluwer, 1993, p.277.

provisions are perceived as a significant revision of the balance of power, and have no counterpart in other Canadian jurisdictions."¹²

A final point of principle must be made. The term "anti-scab" provision is actually a misnomer for the replacement worker legislation enacted in Quebec, Ontario and British Columbia. To justify the restriction of the employer's right to operate during a strike by use of "anti-scab" rhetoric is to accept an obfuscation created by pro-labour provincial governments. In fact, the legislation is largely directed at restricting the use of managers and existing employees in a highly technical fashion. New hires are a small part of the workforce prohibited to the struck employer.

Also, most importantly, hidden in the proposal is a very significant infringement of the right of striking employees to decide to return to work during a strike. Apart from the fact that the individual's right to work is wrongly infringed by this proposal, a significant check on the union's representativeness and bargaining conduct is removed. When strikers may express disagreement with the union's bargaining stance and challenge the legitimacy of the strike by "voting with their feet" and returning to work, the union executive is held accountable to the members throughout the strike and not just when the strike vote is held, which is often long before the strike begins. The potential unravelling of a strike keeps the union responsible at a critical time. Enforcing solidarity by law shelters the union from legitimate dissent, potentially prolongs strikes and deprives individuals who disagree with the strike of their jobs and income indefinitely. The British Columbia version of replacement legislation differs significantly from the Ontario and Quebec version in preserving the individual's right to decide to cross a picket line and return to work. This important issue should not be masked by discussing the proposal as "anti-scab" legislation.

The disruptive impact of this reform on the collective bargaining system is evident. The very legitimacy and acceptability of a balanced collective bargaining regime is threatened by such hasty, unprincipled reform. However, the real impact of reform does not end with the parties and the collective bargaining system - it extends to the economic health of the nation.

¹²*Ibid*, p.278.

ADVERSE IMPACT ON CANADIAN COMPETITIVENESS

Besides creating direct incentive for employers to seek more secure sources of production elsewhere, legislation restricting the employer's ability to operate creates a generally unfavourable climate for business and foreign investment. In a recent survey conducted by the Canadian Chamber of Commerce, 73% of respondents cited existing labour laws as a major impediment to job creation and investment in Canada. In fact, many respondents to the same survey indicated that they have moved or were seriously considering moving some of their business outside Canada because of these types of restrictive government policies. A ban on replacement workers is the sort of reform of labour law which sends absolutely the wrong message to potential investors. In an era of global mobility of investment, jurisdictions are assessed by potential investors and re-investors on many factors, but labour laws are certainly of primary concern. A country's labour laws can operate directly to make it a relatively unattractive location site and indirectly as an indication of whether a favourable climate for business exists.

The federal government has had occasion, in two recent publications, to describe the aspects of the Canadian economy that make it an attractive jurisdiction for investment. The contents of the two publications are briefly reviewed below.

1. Serving North America from Canada

This document was prepared by the Canadian government for the purpose of outlining to potential investors the sophisticated transportation and communication infrastructure that exists in Canada and which serves as a springboard to the North American market and beyond:

Canada and the United States form the largest trading partnership in the world, with two-way trade exceeding \$268 billion in 1993. Canada ships almost three-quarters of its exports to the U.S., and receives about two-thirds of its imports from the U.S.

A sophisticated, cost-effective transportation and communications system supports these massive trade volumes.

...

The huge, affluent Canada-U.S. market just got bigger. Effective January 1, 1994, the North American Free Trade Agreement (NAFTA) integrated the rapidly growing Mexican market into one free trade area....

The efficient, well-maintained infrastructure, built to deliver goods and services throughout this vast North American market, enables companies based in Canada to serve global markets as well....¹³

The 30 page document is dedicated to the promotion of Canada, as a place to invest, through an elaboration of our national infrastructure in all its forms - road, rail, air, communications, marine, pipeline and intermodal services. The document references a 1993 report by the World Economic Forum ranking Canada first among the G-7 nations in terms of the adequacy and flexibility of its road, rail, air and ports of access system relative to business requirements.

The sole thrust of this government publication is that Canada is an attractive place for investment because of its sophisticated and cost-effective transportation and communication system.

Let us contemplate, for a moment, a strike in the transportation sector (i.e., rail or trucking), under the proposed legislation, and its impact on the provincially regulated auto sector.

The automobile industry is central to the Canadian economy. It employs almost 500,000 people (manufacturing: 140,000; retail: 100,000; and aftermarket: 225,000). Automotive companies have invested over 15 billion dollars in Canadian operations over the last decade alone. Over 2 million vehicles were manufactured in 1994 with 85% of those vehicles exported to the United States. Exports represent 35% of the Ontario GDP with automobiles accounting for almost 45% of Ontario's total merchandise exports. For the past thirty years, the auto industry has been fully rationalized on a North American scale. The auto pact has been a great benefit to Canada with 17% of the North American automotive investment being situated in this country.

The automobile industry now operates with synchronous just-in-time inventory and manufacturing systems which require a continuous flow of rail and truck deliveries into and out of its Canadian operations and outside suppliers. Uninterrupted rail and truck service is required by the Canadian automobile industry in the delivery of:

- raw materials and sub-components to outside suppliers;
- parts and components from suppliers to the vehicle assembly plants;
- finished vehicles and components to every dealer and related assembly plant across North America.

¹³The Investment Development Program and its participating departments: the Department of Foreign Affairs and International Trade, and the Department of Industry - 1994, p.5.

Any interruption in rail or truck service within the Canadian auto sector would have a serious impact on the automobile industry, on a *North American* scale, within a matter of days, if not hours. With a rationalized North American auto industry, a number of key Canadian automotive suppliers supply auto assembly plants of manufacturers on both sides of the Canada/U.S. border. This is also true of U.S.-based suppliers. With this degree of rationalization, any interruption in the rail or truck service to these plants, or the closing of the Canada/U.S. border by striking Canadian Customs workers could quickly bring the productive capacity of the entire North American auto industry to a standstill.

In terms of out-bound freight, some Canadian vehicle manufacturers are the sole North American source of the vehicles they produce. In addition, 85% of the production of all Canadian auto assembly plants is shipped to the U.S. A strike among federally regulated rail, truck, or Customs workers could prevent the shipment of these finished vehicles to the United States creating major disruptions in the U.S. market.

For example, General Motors on a daily basis has over 100 rail cars and 925 trucks delivering components to their Canadian vehicle assembly facilities, and over 225 rail cars and 180 trucks are required daily to ship outbound finished vehicles to GM dealers across North America. Their Canadian component operations, as well as outside Canadian suppliers, supply auto parts to every vehicle assembly plant across Canada and the U.S. on a just-in-time basis, via rail and truck. In the event of a rail strike, there would not be enough tractor trailers to meet inbound and outbound shipments in the auto sector. Conversely, in the event of a trucking strike, there would not be enough rail cars.

A series of incidents in 1991 demonstrated the vulnerability of the North American auto industry to disruptions in its cross-border movement of parts and finished goods. In one incident that year, disgruntled independent truckers blockaded the Ambassador Bridge in Windsor, Ontario to protest what they believed were inequities between U.S. and Canadian truck operators. In another incident, Canadian Customs workers conducted a work-to-rule action in sympathy with striking Public Service Alliance Workers. Both incidents effectively closed key Canada-U.S. border crossings with resulting major costs and dislocation for the auto industry. The automotive industry is reliant on civil servants such as customs agents to facilitate their business. An average of 2400 inbound shipments are cleared each day at the border. This is a critical service fundamental to the function of the Canadian economy.

The tension between the increased potential for discontinuance of operations inherent in the contemplated legislative reform and the streamlined workings of the modern auto sector inventory and manufacturing processes is palpable. The mere passage of such legislation, at the federal level, could negatively influence future decisions to invest in Canadian operations or to source from Canadian suppliers given the potentially "unreliable" national transportation infrastructure and the continental implications of an actual interruption in service.

2.Canada: A Bottom Line Investment Perspective

The second government publication, also aimed at attracting investment to the jurisdiction, points to 12 "decisive factors" in Canada's favour. The second and fourth factors warrant discussion.

The second factor listed is "competitive wage and benefit rates", which is explained in the following terms:

Firms in Canada enjoy the benefits of a skilled, cost-effective labour force, which has proven itself to be adaptable to changing technologies and varied international management methods. Productivity is high and rising, offsetting apparent advantages of low wage, low productivity countries. Canadian unit labour costs fell 5% in U.S. dollar terms in the 12 month period ending September 1993.

Canadian wage rates are very competitive with those of other countries, and current trends are making Canada even more competitive. Canadian manufacturing wage rates showed the second slowest growth among G-7 countries in 1992, averaging 2.6%. In 1993, 66% of union workers signed contracts which froze or cut salaries....¹⁴

The fourth factor cited in the publication is "Healthy Labour Relations". In this section, the federal government touts Canada's declining strike incidence for the period 1986-1993.¹⁵

It would appear, from a review of the foregoing publications, that the federal government is well aware of three important factors. First, the federal government understands the essential importance of federal undertakings to our national character and

¹⁴The Investment Development Program and its participating departments: Foreign Affairs and International Trade Canada, and Industry Canada - 1994, p.6.

¹⁵From .2 to less than .05 as a percentage of estimated working time. Although our strike record is indeed improving, as of 1991 Canada still had one of the worst stoppage records of the seven most industrialized countries of the world, second only to Italy. Source: Kumar, P., D. Arrowsmith and L.L. Coates, 1991, *Canadian Labour Relations: An Information Manual*, Industrial Relations Centre, Queen's University, Kingston.

international reputation. Second, the federal government appreciates the connection between investment and industrial peace and stability. Third, the federal government understands the relationship between investment and competitive labour costs. In terms of the second and third points, the federal government would also appear to be satisfied with the performance of our existing industrial relations system and the results of the collective bargaining that has taken place, over the last few years, within that system.

All of this leads to the obvious question: Does the federal government seriously believe that the proposed reform of Canadian labour laws will actually *improve* our competitive position on the world stage by strengthening investor confidence in Canada? The government's own publications would suggest that the answer to this threshold question must be answered in the negative.

The fact of the matter is that the existing collective bargaining system, imperfect as it might be, has served Canada well in these turbulent times which are dominated by global economic competition and massive restructuring. The declining national strike rate and the trend toward more competitive labour costs are but two developments that point to the continuing value of the current collective bargaining system and, more precisely, the ability of the labour market parties, within that system, to move in a direction that is in the national interest. The wisdom of recasting a system that has achieved laudable results under very difficult circumstances, is not readily apparent. On the contrary, the very real danger exists that ideologically-driven legislative reform of the kind contemplated by the federal government will be viewed in a negative light by investors - instead of advancing Canada's competitive position this initiative will tarnish our image. For those proponents of reform who would downplay the significance of the initiative, one has to look no further than the federal government's own publications to appreciate the real impact of the reform proposal in terms of Canada's reputation in the international community.

The recently published text Strategic Negotiations: A Theory of Change in Labor-Management Relations¹⁶, proposes a theory of strategic negotiations based on case histories of labor-management change. It focuses on how adaptive changes currently taking place in U.S. labor-management, largely in response to heightened competition, are negotiated. The authors note that the traditional "rules of the game" of collective bargaining have changed:

Traditionally, the dominant social contract between employers and unions in the United States was premised on arm's-length accommodation, while the dominant social contract between employers and employees was premised on compliance. The rules of the game involved periodic rounds of formal collective bargaining, followed by rule-based contract

¹⁶Walton, Cutcher-Gershenfeld, McKersie, Harvard Business School Press, 1994.

administration. This social contract emerged in the decades following the New Deal and involved an implicit promise of labor peace in exchange for continually rising standards of living.

In the face of global markets and deregulation, we have embarked on an era oriented around *industrial competitiveness* that has shifted the parties' substantive priorities. Management's substantive agenda now emphasizes cost containment, flexible assignment of labor, improvement of quality, and responsiveness to customer needs. Labor's substantive agenda emphasizes job security, protecting past gains, ensuring institutional security for the union, and - in some instances - enlarging the union's role in business decision making. Although some of the agenda items, such as certain cost-cutting measures by management or certain protections of past gains by the union, can be pursued within the rubric of the existing social contract, many of the issues call for a parallel renegotiation of the social contract.¹⁷

The authors engage in an in-depth examination of negotiated change in three industries -the pulp and paper, automotive supply and the railroad industries. They conclude that "Confronted with intense external pressures that call for major revisions in the substantive and/or social contracts with labour, management has adopted one or a combination of three approaches: *escape* the existing labor relationship (eg. by transferring operations), *force* labor to make substantive concessions, or *foster* substantive and social change."¹⁸

Management bargaining objectives were found to be largely uniform - reduced payroll costs, increased flexibility, and sustained contributions by individual workers. The authors found that labour usually resists management's proposals for achieving these ends. The competitiveness era has also raised new labour needs - different approaches to employment security and new inputs into business decision-making. The authors conclude that "the substantive agenda for negotiations in the current era is rich with novel items full of obvious contentious potential and, in many cases, less obvious integrative potential".¹⁹

¹⁷*Ibid*, p.xiii.

¹⁸*Ibid*, p.23.

¹⁹*Ibid*, p.18.

It is beyond the scope of this paper to analyze bargaining strategies or summarize the theory of the text. In essence, the authors conclude that a coordinated strategy of forcing and fostering tends to result in better bargaining outcomes. The text is, however, instructive for our present purposes. Canadian business is today engaged in a massive effort to meet the same competitive pressures identified by the authors in this U.S. study. The goal of the modern workplace which must be competitive, flexible and cooperative applies equally to Canadian employers. Change must be achieved sooner not later.

In a collective bargaining context, change must be negotiated. Relative bargaining power is a key factor in strategic negotiations. Forcing strategies involve using tactics of power and coercion to demand substantive change. An element of forcing, best used along with more positive fostering strategies, is often necessary to achieve the major change required. Bargaining strength is required to implement such a negotiating strategy. If, as a result of legislative intervention, the employer does not have the bargaining strength to negotiate the necessary change, the business will simply not meet its vital operational targets. One or both of the following trends will emerge - either a growing number of businesses will falter within Canada or there will be a noticeable increase in "escape" strategies (i.e. relocation, shifting production or diversion of new investment or reinvestment) with respect to portable and multi-location operations. The ultimate consequence will be an unresponsive industrial relations system, within a withering national economy. Other competing jurisdictions, such as the United States, will be the beneficiaries of the Canadian failure.

Government should not underestimate the connection between the balance of bargaining power present in the collective bargaining system and the ability of Canadian business to respond to competitive pressures and achieve required change at the bargaining table. Labour's demand for a ban on replacement workers must be seen as a demand for more bargaining power in the interest of resisting change in the workplace forced by global competitive pressures. If Canadian business is legislatively handicapped in collective bargaining, the likelihood of achieving necessary change in the labour-management contract will be diminished to the detriment of our national economy and its ability to compete on the North American and international stage.

•**The U.S. Position**

American law takes the diametrically opposite approach to the issue of replacement workers. Under the *McKay* doctrine, U.S. employers are entitled to permanently replace strikers from the first day of a strike. The employer's right to operate its business, including the right to hire new workers, is not in issue. The issue has been whether replacements are temporary or permanent and whether workers may lose their jobs as a result of a strike. Last year, Congress rejected a proposal to reform U.S. labour law by banning permanent replacements, that is it refused to create a legal right of return to their jobs for strikers.

A recent example of the U.S. position is the United Paperworkers International Union strike at the International Paper Company in Jay, Maine. According to the account of *The Boston Globe*,²⁰ the strike began on June 16, 1987 over company demands for wage concessions and work-rule givebacks. The strike, "considered by many to be the best organized and most militant in Maine history, collapsed 16 months later, on October 10, 1988, long after International Paper had trained replacement workers to keep the mill operating". The strike ended when the union's national leaders cut off support for the strikers. In the result, 1,200 union paperworkers were permanently replaced and lost their jobs.

Under U.S. law this result is considered an acceptable consequence of a lost strike. The fact that the company was able to hire and train replacements for the skilled papermakers and operate successfully is taken as an indication that the union's bargaining demands were excessive or unreasonable. The fact that a strike may be lost in this way is something trade unions must contend with by bargaining prudently.

The result of permanent replacement of strikers could not occur in Canada. Canadian Labour Relations Boards provincially and federally have long ago ruled that strikers have a right to return to work in priority over temporary workers and that a "lost" strike cannot result in the loss of strikers' jobs.

It is not our submission that the U.S. legal position is preferable. On the contrary, the Canadian position, which evolved through Board jurisprudence, is well accepted. Nevertheless, the proposal to go further and ban casual or temporary replacements and restrict the use of existing managers, non-bargaining unit employees and dissenting bargaining unit members during a strike, stands in sharp contrast to the U.S. position. This

²⁰February 5, 1989.

is an indication of how far out of step with its major trading partner Canada would be if it pursued this policy.

- **The International Position**

While it is difficult to speak with certainty about the labour law regimes of other countries, our survey indicates that in addition to the U.S., France, England, Germany, Switzerland, Austria and Japan have no restrictions on the use of replacement workers during strikes. Spain, Portugal and Greece appear to be the only countries with statutory restrictions on the employer's right to hire strikebreakers, defined as new workers hired from the date strike notice is served. Quebec, Ontario and British Columbia would appear to have the distinction of being the *only jurisdictions world-wide* which restrict the employer's right to keep its business operating even with existing employees. It is submitted that the federal government should look to the mainstream - the industrialized nations of the world with whom we participate in the global economy - for an appropriate standard as opposed to provincial legislation which may not survive the test of time.

- **The Ogilvie Mills Strike**

The Ogilvie Mills dispute, ongoing in Montreal, is reportedly of concern to the federal government. This dispute is being fought over productivity issues, not wages or benefits. The main issues between the parties involve operating language that governs day-to-day plant functions, such as job placement language which has an extremely significant effect on the profitability of the plant. For example, who fills what job, when and by what criteria. The company is operating during the strike with temporary replacement workers and supervisory personnel. There has been no violence in connection with this dispute.

Ogilvie Mills is operated by Archer Daniels Midland Company ("ADM") which is based in Decatur, Illinois. ADM operates six flour mills in Ontario, Alberta and Quebec and 30 other mills outside Canada. The changes that ADM is seeking in its Montreal labour agreement are no different than changes which the company has already negotiated in all of its other mills, including the five other mills in Canada which are all unionized.

ADM has been in the flour milling business for over 66 years. The company seeks in bargaining what is necessary to successfully run an efficient, productive mill. To settle for anything less is not in the long-term interests of the mill or the employees.

If the federal government wishes to be concerned about this dispute, it should direct its attention to what appears to be unreasonable bargaining conduct by the union and the possibility that this Canadian operation will not meet this competitive challenge successfully. 35 other flour mills operated by ADM have accepted the necessity of the proposed change in the interests of productivity.

Far from illustrating the necessity of labour law reform banning replacement workers, this dispute illustrates the collective bargaining process working as it is designed to. Giving this union the power to shut down this mill would cause the company to fail to deliver products to its customers, creating a financial liability for failure to fulfil contractual

obligations, the loss of about 80 well-paying jobs, and create an adverse effect on wheat farmers, railroads and trucking companies. It would also give increased bargaining power to the union in a dispute where acceding to the union's bargaining position would force the company into an uneconomic operation. The implications for Canadian competitiveness are clear. This ongoing strike in these circumstances is actually proof that the proposed ban on replacement workers would have an extremely adverse impact on Canadian competitiveness and the Canadian economy.

• **The Giant Gold Mine Strike**

Security of the person is the most fundamental human right. The most careful investigation is justified when injury or loss of life occurs in any field of endeavour. It is not, however, accurate to assume a causal connection between the employer's efforts to operate and death occurring during a labour dispute. Nor is it appropriate to assume that a protracted or difficult labour dispute must be caused by employer misconduct. Certain key facts about the Giant Gold Mine dispute, as noted by the Canada Labour Relations Board in its decisions concerning this dispute, tend to be ignored or forgotten:

- Royal Oak Mines was a successor employer at Giant Mine in Yellowknife, N.W.T. The CLRB heard evidence that "for many years at least - and this situation long preceded the arrival of the present employer - the (collective bargaining) relationship has not been a good one."²¹
- The CLRB found on clear and uncontradicted evidence that "the present employer undertook a significant risk, and took on a considerable entrepreneurial challenge, in acquiring the Giant Mine, given its age and nature, the grades of ore presently being mined and no doubt, (although there is no evidence as to this) the price of gold. The evidence also shows that the present employer consciously took on a difficult labour relations challenge, given the history and nature of the labour-management relations on the property."
- The previous collective agreement expired March 31, 1992. Renewal negotiations were carried out in good faith and the parties were successful in reaching a tentative collective agreement. This agreement involved little, if any, change in wages and a number of concessions in other areas which would have the effect of making the new collective agreement "somewhat less generous than its predecessor from the employees' point of view, or more particularly perhaps from that of the union".
- The CLRB found on uncontradicted evidence that such concessions "were necessary if any realistic hope of continuing the mine's operations were to be maintained. The mines operations have been losing substantial amounts of money in recent years,

²¹ *Canadian Association of Smelter and Allied Workers, Local 4 v. Royal Oak Mines Inc.* 94 CLLC 16,026 p.14207.

although the efforts of the present management have reduced, but certainly not yet eliminated, such losses."

- The tentative agreement, although recommended by the union bargaining committee, was overwhelmingly rejected by the membership. The evidence suggested that this was particularly due to the efforts of two persons, not members of the bargaining committee.
- The company was "shocked and outraged" by this rejection by the membership. The CLRB said that the management "although experienced and achieving very good results in mining operations, were not experienced in collective bargaining".
- The company sought to avoid a strike and indicated that it would consider wording changes but nothing that would result in a higher overall cost than the tentative agreement. The union insisted on changes which would involve a considerably higher cost than the tentative agreement.
- The CLRB says that "It appears from the evidence that the union simply did not accept the economics of the situation, although the company's accounts were shown to the union's accountants."
- A total impasse was reached. The employees voted to strike. When it became clear that a strike was imminent, employees were locked out. The lockout and strike began on May 22 and May 23, 1992 and continued until settled by the CLRB in a decision dated November 11, 1993.
- The CLRB noted that the strike was marked by "a great deal of violence, vituperation and hatred, and among the horrible events associated with them has been the mine explosion of September 18, 1992 in which nine persons working in the mine died. A striking member of the bargaining unit has been charged in respect of the explosion and deaths." (Roger Warren was subsequently convicted of nine counts of second degree murder on January 20, 1995).
- With respect to the employer's decision to use replacement workers, the CLRB said as follows:

The employees, as we have said, were entitled to reject the tentative agreement, and of course they were entitled to go on strike. The employer, too, was entitled to attempt to carry on its operations and to weather the strike if it could. *Its decision to carry on operations using replacement workers, while bound to worsen the collective bargaining situation, was based primarily on economic considerations: the evidence is that had the mine been closed by the strike, the probability is high that it would never have reopened. The cost of maintaining the mine on a "care and maintenance" basis was*

prohibitive. The mine has continued to operate, and has returned to, and would appear at times to have surpassed, previous levels of productivity and production. If the union or the employees considered that in the circumstances that prevailed at Giant Mine in the spring and summer of 1992 they could successfully strike the company, events would appear to have proved them wrong.²²

[emphasis added]

- A CLRB finding of bad faith bargaining did not arise until a much later point in the strike. The CLRB found that, at a time when the strike was already more than a year old, the company placed improper preconditions on the resumption of bargaining, as follows:
 1. Because the Giant Mine Employees' Association had applied for certification, there was a cloud over the incumbent union's right to represent the employees and the employer refused to negotiate pending the results of the certification application. The CLRB said that although this hesitation is understandable, it constitutes a failure to bargain in good faith although one which, standing alone, might not lead the CLRB to intervene.
 2. Forty-five striking employees had been discharged by the company for violent misconduct on the picket line. The CLRB said that "there is no doubt that there was considerable violence on the picket line, and that on one occasion, this developed into a full riot." The CLRB also found that the employer deeply and sincerely held the position that it would be dangerous to return such persons to work underground together with others who had worked during the strike. The company was concerned about the significant risk of undetectable assaults or worse occurring underground. However, the CLRB found that the difficulty with the company's position was that it assumed the guilt of the persons discharged. A refusal to bargain about the usual procedure for arbitrating discipline which occurs during a strike constituted a failure to bargain in good faith.
 3. The company's position that returning strikers would be subject to a probationary clause was also found to be an improper proposal which no union could accept.
- The CLRB also found that the union failed to bargain in good faith on a number of occasions "although it would appear by now to have retreated from what can only be called the irrationally optimistic - and obviously unacceptable - positions it put forward from time to time."

²²*Ibid*, p.14,208.

- The CLRB fashioned a remedy designed to put an end to this bargaining intransigence and "agony". Since the CLRB considered that simply directing the parties to bargain would be "unrealistic and even a cruel waste of time", the company was ordered by the CLRB to offer the terms of a collective agreement as recommended by the Industrial Inquiry Commission, special mediators appointed during the strike, and the union was given an opportunity to ratify the agreement. A back-to-work protocol was imposed by the CLRB and the workers hired during the strike were ordered end-tailed on the bargaining unit seniority list in order of date of hire.
- The CLRB noted that the agreement recommended by the Industrial Inquiry Commission was "in essence, the agreement which the company had been willing to accept, which the union rejected in May of 1992 but which it has since, in substance, accepted."

It is significant that both parties to this dispute were eventually guilty of bargaining in bad faith although a tentative agreement was reached at the outset. It was the rejection by the union membership of the tentative collective agreement which was at the root of the problem. The company was not likely to budge from the tentative agreement in subsequent negotiations. Since this tentative agreement was ultimately recommended by the Industrial Inquiry Commission and virtually imposed by the CLRB, the company's bargaining position can not be considered unreasonable. The company's fault lay in refusing to resume bargaining much later, at a time when there was a cloud over the union's right to represent the employees. The union was also at fault in its unreasonable bargaining stances and violent misconduct on the picket line. Several bombs were set, riots occurred and other criminal charges were laid against strikers in addition to the 9 murders. In the end, the strikers gained nothing from this lengthy strike. As the CLRB said:

These parties, both of them, have repeatedly demonstrated the degree of obtuse intransigence which led the very experienced special mediators... to state that this has been the most difficult labour dispute either of them had witnessed. The pathetic history of the parties' negotiations, and the tragic events which have attended the failure of those negotiations lead us to share the pessimism which the mediators and others have expressed.²³

What does this dispute have to tell us about the proposed ban on replacement workers? The CLRB notes that the mine would probably have closed if it could not be kept operational during the strike. It notes that the employer's motive in using replacement workers was economic. The CLRB also found the concessions sought by the company to

²³*Ibid*, p.14,210.

be necessary and that the union simply did not accept the economics of the situation. Empowering this union, which had lost control of the membership and was out of touch with economic reality, with the ability to close the mine by striking, could well result in the loss of the employer's business and the employees' jobs. If the employer was forced by law to shut down the mine, the evidence is that it might have been forced out of business although it had initially bargained in good faith and reached a tentative agreement. Far from being a solution to a problem, this would be a completely unacceptable result for the employer, the employees, the community, the economy and the collective bargaining system.

It is submitted that this dispute, before it completely deteriorated, was really a case of "hard" bargaining. Previous owners of the mine in an era of high gold prices when the mine was profitable, had negotiated generous collective agreements. Striking miners earned an average of \$80,000, and up to \$100,000 annually. When the new owner in an era of low gold prices and mine losses, sought minor concessions and tried to make the mine profitable, it naturally faced difficult bargaining. The union bargaining committee saw the books and agreed to the concessions but lost control of its membership. This is no more than a case of "hard" collective bargaining, ineptly handled; employees failing to accept economic necessities; hostility to a new owner; a misguided and "lost" strike.

The collective bargaining "process" was not at fault, although earlier intervention by federal mediators may have helped the situation. The CLRB remedy was adequate to the dispute. A terrible tragedy occurred during the dispute. It appears that this criminal act was the work of a troubled, unstable personality. The bombing was an abhorrent act of violence; it cannot reasonably be attributed to the use of replacement workers.

STRIKES, PICKET LINES AND VIOLENCE

The most commonly offered justification for interfering in the employer's ability to operate its business during a strike is the prevention of violence. The assumed connection between the use of replacement workers and strike violence and the assumed feasibility of preventing violence by restricting the use of replacement workers requires much closer analysis. This submission will examine the connection between violence and labour disputes in the following ways:

1. The potential for violence inherent in the picket line will be considered;
2. The only available statistical study of violence in relation to strikes and replacement workers, which was published by the Ontario Ministry of Labour in 1992 will be examined; and
3. Theories concerning the sources of violence in labour disputes will be reviewed including several case studies of violent strikes.

We will attempt to draw some conclusions about the sources of violence in labour disputes. More importantly, the analysis will respond to the claim that a ban on replacement workers is an appropriate method of violence prevention.

1. The Potential for Violence is Inherent in the Picket Line

In principle, violence is connected more closely with the strike and the picket line, particularly mass picketing, than it is connected with the use of replacement workers. Replacement workers may be related to violence on the picket line because they have to cross the line and the picketers objective is to prevent them from doing so, and because the fact that replacements are working is seen as an affront to strikers thereby escalating hostilities. However, any violence which occurs is a direct result of the picket line itself.

Violence, whether acts of property damage, sabotage or assault, is unlawful, criminal behaviour. In our opinion, a legitimate and bona fide question to ask is whether some acts of violence on the picket line were the result of strike tactics or even chosen as a union tactic. While it is important to prevent violence where possible, the employer's lawful right to have access to its building and property and to protect its market share, customers and the survival of its business, indeed the survival of the jobs to which strikers will eventually return, cannot be viewed sensibly as a mere provocation to violence by strikers. Short of legislating a complete closure of the employer's operation for the duration of a strike, some business activity will be ongoing which may "provoke" strikers. Employees in other bargaining units, non-unionized staff, and managers may be working and deliveries may cause trucks to enter and leave the employer's premises. The only

legitimate method of preventing and controlling violence during a labour dispute lies in the regulation of picket line conduct by unions, the police, the courts and labour boards.

Both the 1969 Woods Task Force on Labour Relations and the 1968 Rand Royal Commission Inquiry Into Labour Disputes recognized that violence is an inherent ingredient in picketing. The Woods Report stated that:

The traditional medium of persuasion invoked by organized labour is the picket line. Here lies the rub. Organized labour has sought to establish the convention that one does not cross a picket line. There are sophisticated exceptions to this convention, but it is a dominating concept which is designed to effect a conditioned response. The rational element in the conditioning is an appeal to persons to conduct themselves in a manner favourable to the interests of those on whose behalf the picketing is being performed. But as a matter of historical fact, *an ingredient in the picketing has been and continues from time to time to be the generation of apprehension of physical violence, property damage or other forms of retaliation.*²⁴[emphasis added]

The Rand Report stated that "Mass picketing, by relatively large numbers in close ranks or in group formation, effective generally in obstructing entrance to the plant or business, in no western jurisdiction is lawful".²⁵ This is so because:

What mass picketing signifies is potential intimidation and coercion through fear; the implied threat, vague and general, invariably accomplishes one purpose - the destruction of the sense and assurance of security in the ordinary person which it has been the object of our laws for a thousand years to preserve.²⁶

Labour spokesmen told the Rand Commission that they considered mass picketing to be the only effective mode of picketing, that is picketing "by large numbers to generate in the strikers an aroused spirit of militant confidence and courage; to indicate the degree of support for their cause; to establish to all concerned the will and determination that the

²⁴*Ibid*, p.41.

²⁵*Ibid*, p.29.

²⁶The Rand Royal Commission Inquiry Into Labour Disputes, 1968, p.29.

strike should effect its purpose, the shutdown of the plant".²⁷ However, the Rand Commission concluded that the argument that such effective picketing should not be restricted by the law implies that "the interests of labour are entitled, if necessary, to be enforced by intimidation and violence, a view that could be seriously entertained only by the most primitive of human beings".²⁸

Judge Rand expressed sympathy for the feelings of strikers on a picket line:

It is not difficult to imagine the resentment that may be present in a picket line.

Under the goad of inflamed feeling, men and women, rightly or wrongly, may be pressing for what they believe is denied, fair dealing; the end or goals they are seeking may be vain, unrealistic or even malicious; there may be accumulated irritations from clashes with immediate work supervision; sooner or later pent up emotions erupt leaving in their wake a trail of injury and damage.²⁹

He also expressed the employer's perception of mass picketing:

The resistance to having one's property confronted or encircled by a line of antagonistic people is from various causes: apprehension of danger, a sense of being "hemmed in", anger in being deprived of the ordinary enjoyment of property. It is an intrusion into the affairs of another with purpose of causing as much economic injury as possible by an appeal to boycott; in extreme cases, a threatening intimidation that may easily be converted into physical violence.³⁰

To the Rand Commission it was clear that "if we are not to revert to lawlessness, the assertion of any such cause of serious apprehension must be met firmly with the power of the state".

The link between the picket line, particularly mass picketing, and violence is clear. It is the inadequately regulated picket line which is the proximate cause of violence in labour disputes. It is the inherent intimidation and propensity to violence in the unlawful or unregulated picket line which should be the focal point of efforts to prevent violence.

²⁷*Ibid*, p.30.

²⁸*Ibid*, p.30.

²⁹*Ibid*, p.30.

³⁰*Ibid*, p.30.

2. Statistical Study, Ontario Ministry of Labour

An Ontario Ministry of Labour study, "Replacement of Striking Workers During Work Stoppages in 1991"³¹ examined each of 94 work stoppages that occurred in Ontario in 1991. A telephone survey of union and management representatives was conducted to determine the incidence and nature of replacements used during these disputes and whether incidents of violence occurred.

The study found that in 40% of all stoppages, (38 out of 94) involving 62% of all strikers, the work normally performed by the strikers was not done during the stoppage. Most of these respondents reported complete closure during the strike, with lay-offs of office and other non-union employees. Most of the stoppages in plants which were not operated were in manufacturing industries, with 3 retail trade and 2 transportation industry disputes also resulting in a shut down. Strikes in plants not operated during the work stoppage averaged 25.1 days, with 47% settled in less than 14 days, 36% lasting 35 days or longer and one stoppage lasting longer than 70 days.

In 60% of stoppages, the work normally performed by striking workers was continued to some degree. Public sector employers in education and local government reported operating at near full capacity. 34% of operated plants were in manufacturing industries. Stoppages in operated plants averaged 33 days. 36% of these stoppages were settled in less than 14 days, 6 stoppages lasted 14-20 days, 43% of stoppages lasted 21-69 days and 6 stoppages lasted 70 days or longer.

³¹Heywood, April 1992.

The categories of persons who did the work of strikers is shown in Table 10 of the study reproduced below:

Table 10

Staff on Bargaining Unit Work in Plants Operated During Work Stoppages in 1991, by Duration

Staff on Bargaining Unit Work	Number of Stoppages	Workers Involved	Duration of Stoppage		
			Average Days	Minimum Days	Maximum Days
Management only	16 ^a	1,490	23.6	1	75
Management and non-union staff	11	4,455	33.5	12	81
Management, non-union, and new workers	12 ^b	489	53.3	4	143
Management, non-union, and returning strikers	7 ^c	159	28.1	8	65
Management, non-union, and contracting-out	10 ^d	1,241	26.7	4	65
Total	56	7,834	33.0	1	143

^a In one stoppage, management staff were also brought in from another plant.

^bIn one stoppage, management staff were also brought in from another plant, in two stoppages, non-union workers were also brought in from another plant; and in one stoppage, non-union workers were also brought in from another plant, and new workers were also hired from Quebec (plant involved in stoppage was in Ottawa).

^cIn one stoppage, non-union workers were also brought in from another plant.

^dIn one stoppage, some work was also moved to other plants with management staff, and some work was also contracted out.

The first key finding to note from the study is that the use of new hires to replace strikers was shown to occur in a small minority of disputes. In only 12 stoppages of the 94 studied were "new workers" used to replace strikers as opposed to management, non-union staff, returning strikers and contracting-out. It further appears from the notes to the Table that the 12 disputes which used "new workers" included three where the workers were brought in from other plants. The study does not clearly define how it used the term "new worker".

The second finding of note is the apparent longer average duration of disputes where operations continued during the strike, 33 days on average compared with 25 days for non-operated plants. On closer examination, however, this finding is not particularly helpful. Table 12 divides operated plants by industry sector and duration:

Table 12

Staff on Bargaining Unit Work in Plants Operated During Work Stoppages in 1991, by Industry Sector and Duration

Industry Sector and Staff on Bargaining Unit Work	Number of Stoppages	Workers Involved	Duration of Stoppage		
			Average Days	Minimum Days	Maximum Days
Manufacturing					
Management only	12 ^a	923	30.1	1	75
Management and non-union staff	2	240	44.0	39	49
Management, non-union, and new workers	3	90	14.3	4	31
Management, non-union, and returning strikers	2	92	50.0	-	50
Management, non-union, and contracting-out	-	-	-	-	-
Total	19	1,345	31.1	1	75
Non-manufacturing					
Management only	4	567	4.0	2	6
Management and non-union staff	9	4,215	31.2	12	69
Management, non-union and new workers	9 ^b	399	66.3	21	143
Management, non-union, and returning strikers	5 ^c	67	16.2	8	65
Management, non-union, and contracting-out	10 ^d	1,241	26.7	4	65
Total	37	6,489	34.0	2	143
All Stoppages	56	7,834	33.0	1	143

^aIn one stoppage, management staff were also brought in from another plant; in two stoppages, non-union workers were also brought in from another plant.

^bIn one stoppage, management staff were also brought in from another plant, in two stoppages, non-union workers were also brought in from another plant; and in one stoppage, non-union workers were also brought in from another plant, and new workers were also hired from Quebec (plant involved in stoppage was in Ottawa).

^cIn one stoppage, non-union workers were also brought in from another plant.

^dIn one stoppage, some work was also moved to other plants with management staff, and some work was also contracted out.

It is evident from this table that of the 12 plants operated with new workers, 9 were non-manufacturing. The duration of stoppages can be seen to be longest in the non-manufacturing category. Of the 37 non-manufacturing stoppages, the study reveals that 23 were in the public sector - 11 were in education, 8 were in local government, and 4 were in utilities, together involving 5,279 of the total 6,489 workers covered in this category. Education accounted for 74% of the workers involved in plant-operated stoppages. Most or all of the 9 disputes in Table 12 involving the use of new workers in non-manufacturing industries, may in fact be public sector disputes. This study is, therefore, telling us more about the duration of certain public sector strikes than it is telling us about the effect of replacement workers or employer efforts to operate during a strike. Characterizing education and local government as "plants" operated during a strike is questionable. If this study were repeated with public sector disputes removed, the average duration of operated stoppages would in all likelihood be significantly lower.

The most relevant finding is actually the result found in the manufacturing sector. In the category of strikes in operated plants, the shortest in duration were by far the 3 disputes using new workers, which averaged 14 days in duration. In the end result, it is submitted that the variable of not operated or operated by different types of replacement workers, does not appear to be related to strike duration in any significant way. It is only by averaging that a longer duration, which seems to be attributable to certain public sector disputes, can be demonstrated for "operated plants".

The study goes on to examine the incidence of violence in 1991 work stoppages. Table 14 records the incidence of violence by operated and non-operated plants:

Table 14
Incidence of Violence in Work Stoppages in 1991

Intensity	All Stoppages		In Plants Not Operated During Stoppage		In Plants Operated During Stoppage	
	Number of Stoppages	Workers Involved	Number of Stoppages	Workers Involved	Number of Stoppages	Workers Involved
No Violence	60	5,284	29	3,568	31	1,716
Minor Violence	29	14,120	9	9,153	20	4,967
Major Violence	5	1,151	-	-	5	1,151
Total	94	20,555	38	12,721	56	7,854

The first finding to note is that no violence was reported in the majority of stoppages, 60 out of 94. Incidents of "minor" violence were reported in 29 of the stoppages, involving 69% of workers. Incidents of "major" violence were reported in 5 strikes, with charges laid by the police in 6 strikes and one court injunction issued. The study does not define the criteria used to characterize violence as minor or major.

The second finding to note is that violence was reported more often in operated plants than non-operated plants. However, 31% of the stoppages reporting minor violence, involving 65% of striking workers, were shut-down plants. This violence is significant because it can only be explained in the context of the strike and picket line itself, since the employer was not attempting to operate or do the work of strikers. Of the 56 operated plants, 25 reported violence. Therefore, while almost 1/3 of minor violence occurred in non-operated plants, less than 1/2 of operated plants reported incidents of violence. This does not appear to demonstrate a causal link between efforts to operate during a strike and violent incidents on the picket line. All 5 "major" incidents of violence occurred in operated plants. This may indicate a significant connection between efforts to operate and the severity of violent incidents. It then becomes relevant to examine the operated plants category more closely.

Table 15 divides the incidents of violence in operated plants by the persons doing the work of strikers:

Table 15
Incidence of Violence in Plant Operated During Work
nStoppages in 1991, by Staff on Bargaining Unit Work

Staff on Bargaining Unit Work	All Stoppages		No Violence		Minor Violence		Major Violence	
	Number of Stoppages	Workers Involved	Number of Stoppages	Workers Involved	Number of Stoppages	Workers Involved	Number of Stoppages	Workers Involved
Management only	16	1,490	11 ^a	1,032	4	368	1	90
Management and non-union staff	11	4,455	4	191	6	4,053	1	211
Management, non-union, and new workers	12	489	7 ^b	286	4	183	1	20
Management, non-union and returning strikers	7	159	6 ^c	144	1	15	-	-
Management, non-union, and contracting-out	10	1,241	3	63	5	348	2 ^d	830
Total	56	7,834	31	1,716	20	4,967	5	1,151

^aIn one stoppage, management staff were also brought in from another plant.

^bIn one stoppage, management staff were also brought in from another plant, in two stoppages, non-union workers were also brought in from another plant; and in one stoppage, non-union workers were also brought in from another plant, and new workers were also hired from Quebec (plant involved in stoppage was in Ottawa).

^cIn one stoppage, non-union workers were also brought in from another plant.

^dIn one stoppage, some work was also moved to other plants with management staff, and some work was also contracted out.

This table shows that violent incidents, including severe incidents, are spread fairly equally among plants operated with managers, non-union staff, new workers, returning strikers and contracting-out. No real pattern emerges, certainly no pattern which corresponds with workers now prohibited from working in Ontario. This table would suggest that some other unidentified factor in the particular dispute may explain the resort to violence. The study does not attempt to account for the causes of violence or consider numerous factors which may have been more significant than the use of replacement workers, such as the nature of the dispute; the bargaining issues, the identity of the union

involved, the number of workers on the picket line, whether mass-picketing or picketing involving outsiders to the dispute occurred, police conduct or whether violence could have been a deliberate tactic of strikers. The study only looks for a connection between the use of replacement workers and violence. It is arguable that no such connection is found, certainly the study draws no conclusion regarding violence and replacement workers.

It must also be noted that only 5 violent disputes in this study involved new workers and only 1 involved returning strikers, replacement workers that would today be covered by the Bill 40 amendments introduced in Ontario. The balance of the operated plants appear to have used only employees still eligible to work in Ontario, that is managers, non-bargaining unit employees and contracting-out. The connection between using the specific group of now prohibited replacement workers and violent incidents is even less demonstrable than the connection between violence and operated plants generally. With respect to the 12 disputes which used "new hires", 7, or more than half, were non-violent. Of the 7 disputes that reported strikers returning to work, 6 were non-violent. Further, with respect to the 6 disputes which used now prohibited replacements (new workers and returning strikers) and which reported violent incidents, there is no reason to conclude that these disputes would not still involve violence today, since managers and non-union staff would, in all likelihood, still be working.

In conclusion, the study fails to demonstrate a significant connection between employer efforts to operate during a strike and the duration of strikes or violence on the picket line. Operated strikes were slightly longer on average, but on closer analysis other factors appeared to be affecting the length of strikes when considered by industrial sector. Violent incidents were associated with efforts to operate, but not to a degree or in a pattern which would appear to be significant. When the category of "operated plants" is examined more closely, it becomes evident that the use of employees eligible to work under replacement worker legislation is just as likely to be associated with violence as the use of new workers or returning strikers. The study certainly does not establish the causal link necessary to make the claim that a ban on replacement workers will prevent violence during strikes. The study also fails to look for other possible explanations for the violence which occurred, a serious omission.

3. Academic Theories Concerning the Sources of Violence in Labour Disputes

There has been little academic study of the causes of picket line violence. However, it is worthwhile to review the few existing studies.

•Frank

In 1983, J.A. Frank, a pro-labour analyst, published "The Ingredients in Violent Labour Conflicts: Patterns in Four Case Studies".³² Despite Frank's clear anti-establishment bias, the study is revealing. Frank examined four historic labour disputes: two in Quebec, Murray Hill Limousine 1968-69 and Robin Hood Flour Mill, 1977; and two in Ontario, Fleck Manufacturing 1978, and Artistic Woodwork, 1973.

The Murray Hill dispute involved the Mouvement de la libération du taxi (MLT) which represented at most 600 of 4,200 taxi drivers in Montreal. The MLT taxi drivers sought to end the monopoly of Murray Hill's Limousine service to the Dorval airport. This struggle cannot be characterized as a collective bargaining dispute. It was a labour dispute in the broad sense, but essentially was a political struggle. The culminating night of rioting occurred on October 7, 1969, leaving 2 dead, 7 injured, 14 buses and automobiles destroyed, the Murray Hill garage burned and \$2,000,000 in property damage. Both the municipal police and firemen were on strike in Montreal that night. About 50 taxis escorted by a van and a motorcycle gang assembled for a cortège. The demonstrators smashed a Murray Hill limousine en route and, arriving at the Murray Hill garage, threw molotov cocktails, burned 4 buses, and assaulted the garage doors using a bus as a battering ram. Shots were exchanged and shooting casualties mounted. The few police who showed up were driven off. The demonstrators were in the end forced back by the company's guards. An undercover police officer, whom Frank describes as a police spy, was shot to death by a company guard.

Frank's recounting of the Murray Hill "struggle" serves to remind us that violent "labour disputes" do not always involve a lawful strike or a legitimate collective bargaining dispute. Frank analyzes the source of violence as follows. The MLT was a weak organization that only represented a minority of taxi drivers. It was therefore "obliged to seek allies where it could and had to accommodate its aims and tactics to theirs when it conducted collective actions".³³ The very weakness of the MLT required "non-routine actions".³⁴ For two years the MLT held cortèges, strikes, meetings, demonstrations, and

³²Frank, J.A. "The Ingredients in Violent Labour Conflicts: Patterns in Four Case Studies, Labour/Le Travailleur, 12 (Fall 1983), 87-112.

³³*Ibid*, p.95.

³⁴*Ibid*, p.95.

organized blockades. A number of sabotage and hijacking incidents also took place during this period. The Murray Hill affair "concluded a year of street politics involving violent strikes, demonstrations and terrorist bombings". Frank concludes that weak organizations are more likely to adopt the "non-routine forms of collective action" associated with violence.

The purpose of reviewing this dispute is not to imply that modern collective bargaining continues to be marred by such militant violence or even continues to hold this potential. However, this dispute and Frank's analysis of the MLT, in our opinion reveals the possibility that violence may be employed as a tactic by those with a mission which transcends normal collective bargaining.

The second strike studied by Frank is the Robin Hood Flour Mill strike of 1977 which today still symbolizes in many people's minds the sort of violent incident which a ban on replacement workers is designed to avoid.³⁵ On July 22, 1977 security guards at the Robin Hood Flour Mill in Montreal fired on demonstrating strikers, injuring 8. The strike began at four Montreal flour mills, Phenix, Ogilvie, Maple Leaf and Robin Hood, when the federal Anti-Inflation Board (AIB) ruled that the collective agreement in effect between the mills and the Canadian Food and Allied Workers, affiliated with the Confederation of National Trade Unions (CNTU or CSN) exceeded the 1974 wage and price control law. The collective agreement called for wage increases of 11% the first year and 10% the second. The AIB ruled it would authorize 8.5% and 7.5%, requiring a 40¢ per hour wage roll-back. The unions were engaged in an unlawful and political strike aimed at the federal government as much as the mills. Frank states that:

Having gained considerable strength during a period of emerging nationalism in Quebec in the 1960s, the CSN was challenging an alliance of powerful corporations, the federal authorities, and a hostile press. The strike was a risky undertaking. It involved a direct challenge to governmental economic policy. The government would have every reason to test whether or not the CSN was powerful enough to force the government to back down. If the federal authorities backed down, they would jeopardize their whole economic policy as well as the credibility and power of the federal authorities in the eyes of the labour movement. CSN Montreal headquarters also realized that the strike would lead to a bitter conflict "because we were taking on the government"... In spite of these unfavourable odds, the CSN proceeded on the strategic assumption that by shutting down Montreal's mills and preventing imports and then

³⁵Note that the facts about this dispute are partly as reported by Frank but were also directly obtained from newspaper articles of the day. Where conflict exists in the facts, the newspaper version has been preferred.

playing on fears of a bread shortage in Montreal, public pressure would force the government to come to terms.³⁶

According to Frank, the CSN strategy was to gain broad enough support to eventually launch a general sympathy strike. It sought support from other unions including U.S. unions to prevent foreign flour deliveries. According to Frank: "The federal, provincial and municipal authorities had labelled the CSN an unacceptable radical group and launched investigations of its activities. The CSN was also highly suspect as far as the mill operators were concerned. There had never been a peacefully settled wage agreement in their ten years of labour relations with the CSN."³⁷

The mills and bakeries began to import wheat and flour. Bakeries were shutting down and Montrealers were hoarding bread. 'Goon squads' of strikers were reported by trucking companies to be preventing deliveries of flour to bakeries. A court order that the strikers return to work was obtained March 29, which the union voted to defy. According to Frank, "insults, beatings, threats, cars ramming picket lines were all common place". The AIB roll-back had occurred in January, 1977 with the strike beginning on February 4. By mid-July a "face-saving compromise" was found in which the 40¢ per hour would be put in escrow or a pension fund. Robin Hood was the last hold out to this arrangement.

Frank's account of the events of July 22 is as follows. CSN called for a demonstration in front of Robin Hood to pressure Robin Hood to hire back the strikers and accept the compromise. About 200 people assembled for what was supposed to be a routine, symbolic show of support. Robin Hood continued to try to bring trucks through and the Montreal riot squad was called in to clear the way. The riot squad accomplished this, then left only 7 policemen present. The police did not intervene further in the deteriorating situation, but remained on the sidelines. 20 company security guards with truncheons, crash helmets and riot shields exchanged gestures and insults with the 125 demonstrators on the other side of the fence. A group of 30 strikers crashed the gates and went onto company property intending to use a fire hose to spray the guards. The guards went to get their guns and fired at the pavement in front of the strikers. Shot gun pellets ricocheted too low and struck 8 people.

According to Frank, this incident finally brought sufficient pressure to bear on Robin Hood that it had to "shut the plant down and to negotiate with the strikers". However, years later the CSN's strike coordinator said if he had to do it again he wouldn't have started the strike - it obviously wasn't a victory. The security guards who fired their guns were acquitted of criminal charges. The strikers involved in the fracas were fined

³⁶ *Ibid*, p.96.

³⁷ *Ibid*, p.97.

\$500 each. Robin Hood never rehired 55 of the 92 remaining strikers, cut 114 other jobs and transferred part of its operations elsewhere.

Frank concluded that as a result of challenging the AIB over wage controls, the CSN was labelled as a "radical, unacceptable protagonist" that was threatening the established order causing the authorities to take a strong anti-CSN position. On Frank's analysis, the strikers:

... resorted to sabotage, mass demonstrations and boycotts, all non-routine forms of action that a relatively weak protagonist uses in desperation against a powerful coalition of employers and government with the law and court injunctions behind them. The conflict was bound to be long and bitter. The CSN's aim to challenge the government's power to impose economic policy on the country was *ipso facto* illegal.³⁸

The first important fact to remember about this dispute in the context of violence and a ban on replacement workers, is that the strike was unlawful and politically motivated, aimed at wage and price controls, the AIB and the federal government and had nothing to do with normal collective bargaining. Second, the violence of July 22, 1977 occurred in connection with mass picketing and was directly attributable to poor police control and the deliberate actions of both security guards and demonstrators. Although the actions of its security guards were deplorable, it is problematic to blame the violence on Robin Hood's efforts to operate the mill in the face of a 7 month unlawful walkout. This was not a situation in which the employer would be shut-down by replacement worker legislation. The mythology somehow survives that Quebec's "anti-scab" law cured a violence problem exemplified by the Robin Hood Flour Mill strike. This may be provocative. In fact, Quebec society has changed drastically since the days of the Murray Hill limousine riot. The Robin Hood Flour strike, although it resulted in tragedy, cannot be characterized as a problem caused by the use of replacement workers. Frank's analysis reveals, on the contrary, a labour dispute which approached social insurrection.

The constant reference to violent Quebec labour disputes of the past in the context of replacement worker legislation is misleading. In fact, these unlawful disputes shed no light on replacement workers in a normal collective bargaining context or on modern labour relations in the 1990's.

Further, violent labour disputes have not in fact been eliminated from the Quebec scene. The 1990 rotating strikes by 14,000 Hydro-Quebec workers featured incidents of workers rampaging through four different utility offices, causing \$40,000 in property

³⁸ *Ibid*, p.100.

damage to one office alone. Explosive cartridges were found at utility headquarters where police wearing bullet-proof vests were required to escort Hydro-Quebec officials past pickets. Acts of vandalism to fiberoptic cable and power station equipment were reported. Similarly, the intermittent strikes in 1991-92 by 1,500 Montreal municipal workers involved two bombs exploding near the home and office of the chairman of the Montreal Urban Community executive committee and vandalism and damage to city property; and arson causing fires at a municipal incinerator and the Botanical Gardens. In 1993, staged disruptions of public transit and rush-hour traffic, including picket lines which kept more than 1,000 buses off the road, occurred when Montreal municipal workers protested a wage freeze law for public employees. On September 13, 1993 a riot occurred at Montreal city hall, in which a group of 50 to 60 persons wearing helmets and gloves, carrying bats and two battering rams, tried to force an entrance to City Hall causing \$10,000 in damage.³⁹

The next strikes examined by Frank are Fleck Manufacturing 1978 and Artistic Woodwork, 1973. Both involved small Ontario manufacturers and struggles for first collective agreements and union security. In both cases, the small bargaining units needed support from outside groups to sustain their strike. According to Frank, this changes and politicizes the issues of the strike since the strikers are forced to broaden their aims to encompass the interests of all the supporting groups. In the case of Fleck Manufacturing, as labour began to see the strike as a trial of strength, the picket line ballooned into a mass demonstration with large numbers of outsiders involved. This in turn makes it harder for the union to maintain picket line discipline and routine. The more people present, the greater risk of violent confrontations. Police reacted to mass picketing with a convoy of police cars. According to Frank, "most of the conflict involved mass picketing and exceptionally massive police repression as both sides fought for control over access to the plant". Frank concludes that the high-profile incidents surrounding the strike eventually helped the union to win its first collective agreement. However, he also concludes that the necessity of forming a broad coalition composed of a variety of fringe groups caused the strike issues to be broadened and politicized. The union is then obliged to adopt a non-routine form of collective action - mass picketing. The use of mass picketing instead of symbolic informational picketing causes "massive repression" by the authorities in response. Frank concludes that this combination led to the violence at Fleck.

Similarly, Artistic Woodwork involved a struggle for a first collective agreement at a small Toronto manufacturing plant. Frank again concludes that the use of mass picketing, the Canadian Textile and Chemical Union's "unacceptable political status" as a maverick, radical, independent union and its practice of engaging in "forms of collective action involving potentially intense confrontations" led to the type of labour conflict where "repressive violence" has most frequently tended to occur.

³⁹All information as reported in the Montreal Gazette.

Frank's study therefore concludes that unions with well organized and disciplined workers capable of controlling their supporters are better able to control violent reactions to "police and employer harassment". Although Frank's bias is clear in that he uniformly blames the "repressive forces" of the police and authorities for violent incidents which occur in labour conflicts, even as he explains how the union resorted to violent tactics, his conclusions as to the sources of violence are still useful. According to Frank, the outbreak of violence is related to mass picketing and non-routine strategies adopted by weak unions forced to seek allies in their struggle which then becomes politicized and leads to repressive action by police and management.

We can also look at the Fleck and Artistic strikes in another context not discussed by Frank. The underlying problem in a difficult first agreement dispute may be the employer's unwillingness to accept the collective bargaining regime. Employer bargaining of issues such as a union security clause to impasse may be an indication of unwillingness on the employer's part to reach a collective agreement. Such first agreement struggles have been eliminated in both Ontario and the federal sector by a series of incremental amendments and labour board remedies, in particular the legislated Rand formula of dues deduction and access to first agreement arbitration. These are examples of labour policies designed to strengthen the institution of collective bargaining and not weaken the position of one of the participants. To the extent that bitter, high profile first agreement disputes, such as Fleck or Artistic, historically involved resort to mass picketing and violence, violence may be reduced by access to first agreement arbitration. So long as this remedy is triggered by employer misconduct in bargaining, the remedy is a justifiable intervention and any resulting reduction in sources of violence is a legitimate side-effect of intervention. However, it is not the resort to unlawful mass picketing or violence even in a "just" cause which justifies the interference in the collective bargaining process - it is the underlying employer misconduct in bargaining which warrants a remedy.

We can learn two things from Frank's study of four violent labour disputes. First, we can accept as meaningful Frank's own observation that the common thread underlying resort to violence was mass picketing and non-routine strategies adopted by weak unions in the face of strong resistance by the employer and police. Second, we can distinguish for purposes of our analysis between legitimate collective bargaining struggles and unlawful labour disputes. Although both may have violent elements in common with similar triggering factors such as mass picketing, it becomes clear that one type of dispute may warrant a collective bargaining process remedy (the first agreement dispute) while the other type of dispute (unlawful political strikes and demonstrations) warrants no remedy. Rather, it is the employer and the public that require police protection and the restoration of law and order in the face of such violence. It cannot be assumed that because workers are on strike, picketing en masse and a dispute becomes violent that the employer is guilty of some underlying misconduct or that interference in the employer's business, property or collective bargaining rights is warranted to "cure" the violent conduct.

•Wallace and Grant

A 1991 study by Wallace and Grant, "Why Do Strikes Turn Violent?"⁴⁰ looked at the issue in sociological terms. The "resource-mobilization" theory says that violence plays an instrumental role for "outsider" groups seeking political recognition, but usually only up to the point in time when the group achieves such recognition. Unions, as groups already incorporated into the polity, if only marginally, are considered "weak insiders". This study concludes that "weak insider groups such as labour unions do not necessarily discard violent tactics once they gain legitimate standing in the polity. Rather, they may employ violence selectively, particularly if their position in the system is threatened."

Using Ontario strike statistics and regression analysis, Wallace and Grant conclude that strike violence is related to "the socio-political context within which strikes occur, the legislative environment, the skill mix of striking workers, and of great importance, the strategies utilized by striking workers and the counter strategies used by employers".

•Geary

Roger Geary's book Policing Industrial Disputes: 1893-1985 studies the history of policing labour disputes in Great Britain. Geary found several historically distinct forms of industrial disorder and corresponding police control tactics. An historical trend towards less violence was identified up to 1980, as police batoning gave way to police cordons and picketers stoning gave way to pushing and shoving. The growth of the mass media was partly credited for the reduction in picketing violence as labour realized the importance of public opinion.

Geary's study demonstrates that violence can be controlled by unions when they decide to adopt a peaceful strategy. The miners' strike of 1974 took place during a general election campaign. Aware of the likely effect of trouble on the picket line on Labour's fortunes in the election, the National Union of Miners (NUM) decided to actively discourage both violence and mass picketing. NUM circulated a strict "code of behaviour" to local branch secretaries. The number of picketers on any picket line was restricted to 6 and picketing could not take place without the express approval of the National Strike Committee. Each area established close liaison with the local Chief Constable. An official NUM picket identification badge was issued. Officials were urged to "impress on pickets that they must behave in a disciplined and peaceful manner even if they are provoked". Geary concludes that NUM leaders, at both the national and local level, went to great lengths to restrain their members with the result that there were no serious incidents of violence.

⁴⁰University of Chicago, American Journal of Sociology Volume 96 Number 5 (March 1991) p. 1117.

In contrast, the long drawn-out miners' strike of 1984 was more violent than any other post-war industrial dispute. A taxi driver transporting non-strikers to work in South Wales was killed by strikers. Although most picketing was orderly, Geary found that it was when mass pickets were called that disorder occurred. Fifteen occasions of serious disorder in the first year of the strike indicated a "new and more violent pattern of confrontation". Geary found that several factors accounted for the shift away from the previous trend towards less violence. Police tactics may escalate violence, including the deployment of riot shields which Geary found may actually encourage stoning. When police employ a cordon or pushing strategy picketers respond by pushing back. Plastic shields "invite" picketers to throw rocks and stones at police. Geary concludes that intimidation of working miners, destruction of Coal Board property and attacks on police stations are evidence of a frustrated backlash, ironically caused by increasingly successful police tactics. Conventional picketing can't be "won" by strikers in the face of riot police. Other factors Geary found increased violence were the lack of unity among strikers with many miners working, the length of the strike and the hardship caused, and the new militant majority on the NUM Executive. No longer committed to reform via the Labour Party and moderate tactics, NUM loosened the constraints on industrial violence. Arthur Scargill, in particular, resolutely refused to condemn picket line violence.

Geary's study would suggest that if the objective is to prevent violence, the target should be control of the picket line and the best means to achieve that result would be to hold union officers responsible for maintaining discipline and controlling numbers of picketers.

• **Latornell**

The next study of interest is by James Latornell, "Violence on the Picket Line: The Law and Police Response" published by the Industrial Relations Centre of Queens University in 1993. Latornell's paper examines the police response to picket line violence and misconduct and concludes that "The police are faced with a profound problem of how best to preserve the peace and enforce criminal law while maintaining neutrality in the labour dispute". In the context of examining the police role of preserving the peace during labour disputes, Latornell considers the possible causes of picket line violence and misconduct. His starting point, taken from the Woods Report, the Rand Report and the basic process of collective bargaining, is that "Since the Canadian industrial relations system is designed to resolve conflict through the use of conflict, violence and misconduct was and would continue to be a part of the adversarial nature of industrial relations in this country."

Explanations for the underlying roots of violence are examined by Latornell. He notes the following factors in summary:

Several factors that may lead to violence and misconduct on the picket line are a weak labour group (eg. those engaged in first collective

actions), lack of punishment for violent behaviour, employer attempts to continue operations, and the increased level of stress associated with a strike situation.

Latornell then examines the role of police in the regulation of the picket line. The regulation of picketing involves an "attempt to balance fairly and reasonably employers' freedom to continue business during a work stoppage with unions' freedom of speech". The lawful element of picketing is the informational, free speech element designed to secure a sympathetic response from third parties to the picketers' position in the labour dispute. The inherent conflict for the police lies in the gap between the reality of the picket line and its theoretical purpose. The law of picketing is premised on the assumption that picketing will be undertaken peacefully to demonstrate protest while the employer continues to operate its business. This assumption does not accord with the reality that, to varying degrees, the picket line is prone to misconduct and violence. Therefore, "the basis for police involvement in a labour dispute lies not in the strict interpretation of the law as outlined in various labour relations statutes, but as a result of the realities of such situations".

The criminal offences examined by Latornell which may be committed during routine picketing include intimidation; mischief, which includes deliberate blocking of the entrance of a struck enterprise; causing a disturbance; and trespass. Also, persons attempting to cross a picket line must do so in a manner that will not endanger the life or safety of any person. A driver that attempts to force his way across a picket line may be guilty of the offence of dangerous driving. According to Latornell:

The greatest problem faced by police in the enforcement of the *Criminal Code* within the context of a labour dispute is the lack of a clear definition of when peaceful picketing ceases to communicate information and starts to take on aspects of intimidation, mischief and/or disturbance. As such, the police are left to their own discretion in determining when charges should or should not be laid.⁴¹

Picketing is part of the "game of tactics" in a strike. The more effective the union is in delaying or obstructing access to a struck plant, the more ineffective the employer is in continuing operations. The police tend to get caught in the middle as employers request police assistance to maintain unobstructed access and unions push the delay before moving a blockade as long as possible. Picketers may maximize obstruction by monitoring

⁴¹Latornell, "Violence on the Picket Line: The Law and Police Response", Queen's University, Industrial Relations Centre, p.27.

police radio channels to tell when police will be attending the strike scene. In practice, the police become mediators and seek to reach agreements with the parties as to how long picketers will be allowed to delay persons or vehicles crossing the picket lines. Such agreements in effect countenance illegal delays. In countenancing such arrangements, police put the interests of keeping the peace ahead of strict enforcement of the law. Although such a use of police discretion is effective in an attempt to avoid conflict Latornell concludes that it poses an interesting policy question:

If the police, using their discretionary power, allow picketing beyond that necessary to impart information, the short-run goal of preservation of the peace is largely fulfilled. However, such discretionary activities may well legitimize union attempts to prolong the delay caused by picketing and may also reinforce the convention that striking union members have the legal right to impede traffic and people who wish to gain access to a struck enterprise.

Such an approach, which provides preservation of the peace, may in the long run, lead to more difficult confrontations between the police and picketers. Picketers, who hold the belief that they may legitimately obstruct those people and vehicles crossing a picket line, may react with hostility to police attempts to open a picket line in order to remove a potential hazard to the public. There are not clear answers to this dilemma. It is clear, however, that the police must give due consideration to both the short-run and the long-run effects when deciding whether to forego strict interpretation and enforcement of the law in the interests of preservation of the peace.⁴²

Latornell then considers Ontario's new "anti-scab" legislation and whether it will reduce picket line violence and misconduct.

From the perspective of law enforcement, there is mixed opinion about the effect of the "anti-scab" legislation on policing practices. Some spokespersons noted that the legislation will reduce the number of persons and vehicles crossing a picket line, thereby reducing potential opportunities for violence. However, these opinions were generally tempered with the observation that in most cases, management employees as well as workers from other bargaining units would still be

⁴²*Ibid*, p.34.

crossing the picket line, therefore, the potential for violence would not be completely eliminated. One spokesperson noted that the legislation may have a negative effect in that it reduces the need for the police to meet with the parties at the outset of a strike. As noted above, the police welcome such meetings as an opportunity not only to make clear the police role, but also to begin the process of gathering intelligence and information.⁴³

This is far from a ringing endorsement of such legislation as a means of preventing violence.

Latornell clearly associates the potential for violence in a labour dispute with the picket line. He concludes that it is across the picket line that the union's right to "peacefully demonstrate and use the power of rational persuasion to convince people not to cross conflicts with the employer's "right to continue doing business during a strike by his employees". According to, Latornell "the real source of picket line violence is the confrontation which results when the parties pursue their respective rights". The point at which picketing becomes criminal intimidation is unclear, leaving police significant discretion. The police view their primary role in a labour dispute as one of peace-keeping rather than strict law enforcement. This response is reasonable and as effective as budgetary and manpower constraints allow. Latornell concludes, however, that this policy serves to legitimize unions actions on the picket line aimed at complete closure of a struck enterprise. Latornell suggests that policy makers need to carefully consider whether a police approach which gives legitimacy to such actions is desirable.

The same concern can be expressed about a policy to restrict by law the employer's right to operate during a strike. In the long run, such policies reinforce the union convention that they have a right to impede traffic and people who wish to gain access to the struck premises. Hostility to police efforts to enforce the law and clear access to the employer's property may only increase, leading to more difficult picket line confrontations between police and picketers in future. The solution to violence occurring on the picket line lies in proper policing, which includes both peace-keeping and law enforcement. Removing the employer's right to do business during the strike is just further reinforcement of the unlawful or criminal purpose of the picket line.

•The U.S. Experience

U.S. law differs significantly from the Canadian approach in the treatment of the issue of picket line violence. In 1947, the Taft-Hartley revisions to the *National Labor Relations Act* outlawed union coercion and made it possible for employers to bring charges against unions for acts or threats of violence. Therefore, not only would the suggestion

⁴³*Ibid*, p.36.

that the employer's right to operate or hire replacements be restricted as a method of preventing violence be completely unacceptable in the U.S., but the labour relations system is designed to hold unions accountable for picket line violence which occurs. The National Labor Relations Board has even revoked the certification of unions guilty of engaging in violence on a number of occasions.

An examination of NLRB cases involving union violence between 1950-1979 by Paul Brinker, reveals the mixed distribution of causes of violence:

Immediate Cause of Violence	Percent of Cases
Organization strike	29
Renewal of contract problems	13
Internal union dissension	15
Jurisdictional	6
Dispute over grievances on firing of workers	5
Union disciplining of workers	2
Demand that all workers join union	4
Hiring through union required	2
Problem with transferees	2
New firm taking over unionized plant or contracting out work	negligible
Problems of not working behind picket line	4
Decertification petitions	2
Union hiring hall dispatch problems	2
Unfair labour practice strike	1
Union rejected settlement workers agreed to	1
Unknown causes	13
TOTAL	101^a

^a Does not equal 100 percent due to rounding.⁴⁴

The American approach of holding trade unions accountable for their violent acts in a labour relations context and not just through criminal charges against individuals no doubt has a significant deterrent effect. While Canadian labour reform in this direction may not be required in 1995, it is a reform proposal that may merit future consideration.

⁴⁴Brinker, Paul, "Violence by U.S. Labor Unions", Journal of Labor Research, Volume VI, No. 4, Fall 1985, p.422.

American studies have also offered explanations for the sources of violence in labour disputes. The text by Thiebolt and Haggard, Union Violence: The Record and the Response by Courts, Legislatures and the NLRB⁴⁵, concludes that labour violence is substantial, systematically applied, and not diminishing. The authors study union violence cases under the Taft-Hartley provisions and statistics on violence involving labour unions. Between 1975-1981 there were 2,598 incidents of violence including 49 deaths; \$15.2 million in damages to company plant and equipment; 2,732 incidents of damage to automobiles; 133 cases of managers and nonstrikers' homes being firebombed, shot at, or vandalized; hundreds of cases of sabotage and vandalism and thousands of shots fired. Certain unions were identified as the worst offenders. Significantly, the authors find that in industries which do not operate during a strike, violence is directed at non-union employees, non-union competitors and rival labour organizations. The authors urge unions to adhere to the "conventional ethical norm against initiation of physical violence" and recommend a change in laws which tacitly approve of "minor violence" since this only "serves to guarantee its recurrence". They also recommend that unions with histories of violence lose their legal status as bargaining agent.

The review article "Union Violence" by Morgan Reynolds⁴⁶ from which the above summary of Thiebolt and Haggard's work is taken, approves of the authors' findings and offers the "monopoly or cartel theory of unionism" to account for the association between unions and violence. According to this theory:

In order to force buyers to pay more than is necessary for labor services, unions must restrict or cut off the supply of labor to struck enterprises. The only effective way to do this is through threats and violence, because many qualified U.S. workers are willing to defy picket lines and accept wages and working conditions that are below those demanded by unionists. The employer's (and consumer's) interest, by contrast, is to preserve access to a free labor market and maintain peaceful conditions so that work and production can proceed smoothly and economically.⁴⁷

⁴⁵Thiebolt and Haggard, Industrial Research Unit, Wharton School, University of Pennsylvania, 1983.

⁴⁶Journal of Labor Research, Volume V, Number 3, Summer 1984.

⁴⁷*Ibid*, p.244.

Reynolds also concludes that:

When the strikers who vandalize, threaten, and assault others are routinely reinstated in their jobs with back pay, we have a formula for irresponsibility; perhaps savagery is not too strong a word. Incentives account for violent behaviour, not alienation from work or the economic system.⁴⁸

Union violence may be more pervasive in the more free-wheeling U.S. labour relations system. Nevertheless, union violence is a concern in Canada as well. American commentators seem more willing to openly discuss union violence as a deliberate tactic to be deplored.

Conclusion

Conflict is necessarily inherent in collective bargaining and the objective of reform should not be to remove conflict. Intimidation and coercion are inherent in the picket line, whose real purpose is usually not to peacefully communicate information to the public, but to obstruct access to the employer's premises. The potential for violence is latent in such confrontations. Labour is the party responsible for maintaining discipline and conducting a lawful picket line, and is therefore the party most able to prevent violence in labour disputes. When violence occurs, it may be for numerous and complex reasons including chosen tactics, mass picketing or even unlawful picketing methods. Therefore, the primary method of violence prevention in labour disputes should be the proper regulation of picket lines through restricting numbers of picketers and holding union leaders accountable for the conduct of picketers. This method of violence prevention has been largely unexplored by our labour relations system, as indeed trade union accountability has been remarkably absent from our law.

Trade unions have become increasingly institutionalized in our society in recent years and given ever-increasing responsibilities beyond that of bargaining agent. For example, unions now have legislated responsibilities for administering health and safety programs; employment equity and pay equity programs alongside employers; responsibility for managing venture capital and investment funds; and participate in tripartite administration of boards and programs such as workers' compensation. Violence as a method of obtaining goals is associated with fringe movements, not mainstream institutions. It is time that labour unions abandon any association with violence as a tactic and are held accountable for its prevention.

⁴⁸*Ibid*, p.245.

The second method of violence prevention is in the policing of picket lines and labour disputes. While it is appropriate that the police continue to exercise a discretion in laying criminal charges and balance their peacekeeping duties with their law enforcement duties, there is no reason to alter the existing balance even further towards tolerating or condoning unlawful picket line activity. The apparent belief among trade unionists that they have the right to obstruct access to employer premises should not be reinforced, either by police failure to enforce the law or by legislative amendment which targets the employer's right to operate in the name of violence prevention.

The third legitimate method of violence prevention is through CLRB remedies for unlawful bargaining conduct and the conciliation and mediation of difficult disputes. Where employer misconduct underlies a hard bargaining stance, namely an attempt to avoid reaching a collective agreement or to undermine the union's recognition rights, the appropriate CLRB remedy may indirectly prevent violence. Access to first agreement arbitration, CLRB orders in cases of bad faith bargaining and statutory protection for strikers who wish to return to their jobs, are examples of such appropriate remedies.

Whether further remedial authority is required may be a subject for consideration in the context of a general review of the *Canada Labour Code*. There may be merit in giving the Canada Labour Relations Board the option of restricting the use of new hires in cases where the employer has failed to bargain in good faith and is pursuing an unlawful strategy to undermine the union. However, it is important to remember that employer misconduct in bargaining aimed at breaking the union has already been largely removed, if not eliminated from the Canadian collective bargaining scene. Today, a difficult labour dispute is more likely to be caused by hard, concession bargaining, equally likely to involve unreasonable or misguided bargaining stances by trade unions. It is completely inappropriate to restrict the employer's right to operate in such disputes in the name of preventing violence. When the employer is legitimately attempting to weather a strike brought about by unreasonable union demands and bargaining conduct, a further handicap imposed by law may be the final blow to the employer's business.

The connection between replacement workers and violence has not been established. An employer may operate during a short, peaceful strike as established by the 1992 Ontario Ministry of Labour study. The employer's decision to operate may be based on the nature of the business or operating methods, customer requirements or contract commitments. Conversely, violence may occur in a significant proportion of strikes despite the operation being shut down. This also was established by the 1992 Ontario Ministry of Labour Study. Violent labour disputes continue to occur in Quebec, Ontario and British Columbia. Under a scheme whereby some persons are permitted to work while others are prohibited, violent incidents related to employer efforts to operate and picket line crossings will continue to occur.

A non-remedial legislative approach which simply removes the ability of all employers to operate, although such action may be necessary to keep the business alive,

regardless of bargaining conduct and even during a misguided strike, is clearly punitive. In the final analysis, the prevention of violence lies in the regulation of the picket line. Unions must exert control and discipline over their striking members, not be rewarded at the bargaining table for violent incidents. Employers, in turn, must recognize and respect the legitimacy of peaceful information picketing in support of a lawful strike.

RECOMMENDATION

On behalf of its members across Canada, the Canadian Chamber of Commerce urges HRDC and the Government of Canada to reject this dangerous proposal for reform. The consequences of adopting this reform in the federal sector will be national in scope and hazardous to the very fabric of the Canadian economy. The reform is unprincipled and misguided. It serves no purpose other than the delivery of bargaining power to the trade union movement, a goal perhaps not surprising given the ideological foundations of certain provincial governments, but completely unacceptable for the federal government - the custodian of the national infrastructure and essential services of the Canadian economy.

In an era of increased global competition it is not an exaggeration to raise fears over the potential damage to Canadian businesses and Canada's strategies for economic growth and job creation. Investors would be given a powerful incentive to either avoid or flee the jurisdiction. Employers would be severely handicapped in bargaining for necessary workplace adjustment in response to competitive challenges to the business. Increased deregulation and free trade strategies subject employers to increased competitive pressures. Collective bargaining must be allowed to operate as designed in response to such pressures.

The rationale offered for reform of reducing strikes and violence has been exposed and found lacking. Indeed, no proper rationale for reform exists. The process of hasty, one-sided reform must be abandoned. Restrictions on the employer's ability to operate during a strike where the employer's purpose is to undermine the union's recognition rights may merit consideration as part of a review of the Canada Labour Relations Board's remedial authority. It is the urgent submission of the Chamber that no other reform concerning replacement workers, however, should be considered by the federal government.

APPENDIX "A"

•The A & P Strike

The A & P Grocery Store strike of 7,040 employees at 63 stores across Ontario gave rise to the first OLRB decision under section 73.1, the replacement worker provision of the Ontario *Labour Relations Act* introduced in January, 1993. In this case, the company had determined to close its stores and not to attempt to operate in the event of a strike. When a strike seemed imminent the company halted delivery of perishable products and attempted to empty its stores of fresh food. Negotiations then continued for several days and the company decided to deliver large orders of meat, dairy goods, produce and other fresh products. The strike commenced later that same day. The company then closed the stores and in the first hours of the strike attempted to pack up the perishable products in each store and bring them out through the picket line for return to distributors and delivery to non-struck stores and food banks. The union complained to the OLRB under section 73.1 that head office employees such as managers, a field merchandiser and a Health and Safety Director performed some of the work of removing the perishable food.

It was admitted by the company that the persons working were prohibited under section 73.1. The company argued first, that the work of removing perishable food from the stores was not normal bargaining unit work and second, that the OLRB should allow a "grace period" in the early hours of a strike before finding a violation of section 73.1 could occur. The OLRB rejected those arguments, found that the company had violated the Act and made a cease and desist order.⁴⁹

The fact that the struck employer was subject to this type of proceeding on these facts is a telling indication of how fundamentally the ground rules of labour disputes changed with the introduction of the replacement worker provisions in Ontario in January of 1993. Far from hiring replacement workers to keep stores open to the public during the strike, the employer's violation in this case was using the wrong managers to remove perishable food from closed stores at the outset of the strike. The consequence of the Board's order under section 73.1 in this case was that food would rot on store shelves.

The A & P strike lasted from November 18, 1993 to February 21, 1994 and ended in a "concession-laden" deal. Many of the stores did not reopen. To the extent that section 73.1 gave the union an exaggerated and unchecked sense of bargaining power, the strike could have been prolonged by the legislation. To the extent that the union was empowered at the bargaining table by section 73.1, the potential for economic damage on the employer by the strike increased.

⁴⁹*The Great Atlantic and Pacific Company of Canada Ltd. v. UFCW, Locals 175 and 633 et al.* [1994] OLRB Rep. March 303.

•**The Red Cross Strike**

In the second major OLRB decision under the replacement worker provisions, it was the union's argument and the collective bargaining result which was disturbing rather than the OLRB decision⁵⁰. A local branch of the Canadian Red Cross Society was faced with a strike of its homecare workers. Homecare workers work as assigned in the homes of clients, for example patients recently discharged from the hospital or receiving palliative care, providing non-medical, household and personal assistance. In preparation for a strike at the Red Cross, the public health agencies which contracted for homemaker services made contingency plans to have other suppliers of homemakers take over the Red Cross clients. When the strike began on March 1, 1993, 1200 clients were called by the health agencies and 300-400 serious cases were reassigned to other providers of homemaker services. The rest of the clients made their own arrangements but might also be lost as Red Cross clients as a result of the strike.

The Red Cross had advised the union and the homemakers during bargaining that a strike would likely result in the loss of clients and therefore the loss of homemaker jobs. The Red Cross, a not-for-profit organization, also advised its homemakers that it was not in a position to pay the 253 unionized homemakers differently than the other 5500 homemakers working throughout Ontario.

The union having commenced the strike in this unlikely bargaining situation, proceeded to allege a violation of section 73.1 before the OLRB. The union argued that because the bargaining unit work was being performed by other "allied" agencies, the intent of the replacement worker provisions was being violated. In essence the union argued that section 73.1 required that the work go unperformed:

The unions argue that unless we find that what happened here violated the Act, it will be impossible for homemakers to organize since they will not be able to strike in any meaningful sense as the work will be immediately removed. In the unions' view, Red Cross has circumvented the scheme of replacement worker provisions, when it could easily have taken care of the critical clients and met its labour relations obligations by functioning within that scheme.⁵¹

⁵⁰*Service Employees International Union, Local 204 and Local 532 v. The Canadian Red Cross Society Ontario Division et al.* [1994] OLRB Rep January 34 (McCormack).

⁵¹ *Ibid*, at p.43.

Some comfort may be taken from the fact that the OLRB did not accept the union's argument. The OLRB found that the struck work was not being performed by other agencies or employers acting on behalf of Red Cross but by competitors who were simply taking advantage of the market opportunity presented by the strike.

However, the fact that the Red Cross was forced to defend this case and to suffer this loss of business is disturbing. The union no doubt began this strike believing section 73.1 would allow it to shut the Red Cross down and force a settlement. Instead a loss of Red Cross business resulted. When the employer is prohibited from hiring replacements or deploying its existing workforce to protect its business from competitors, it is powerless to avoid the economic loss inflicted by the striking union.

In the *Red Cross* case, the strike lasted from March 1, 1993 to June 21, 1993. The strike ended after four months in a settlement which contained no wage increase for the homemakers over a two-year contract. (The old hourly rate of \$8.67 remained unchanged). Some service clerks received a 1% wage increase, but other service clerk wages were reduced by -6.73%. Clearly, the Red Cross employees gained little or nothing as a result of this strike.

In a situation where the union's bargaining position is unsupportable, section 73.1 removes a traditional pressure which can cause the strike to unravel - the loss of solidarity as employees decide to return to work. Under current Ontario law, the strike can be prolonged by the union's inflated and unchecked sense of bargaining strength and a multiplicity of OLRB proceedings.

• Famous Players Strike

The Famous Players strike of seven employees represented by the Theatrical Stage Employees, Local 357, began on September 20, 1993 at two Kitchener theatres and lasted until January 24, 1994. The employer closed one struck theatre but attempted to operate the other by using an assistant manager, who was qualified as an apprentice projectionist, to operate the projection equipment. The assistant manager was eligible to work at the struck location under section 73.1, but because of a requirement under the *Theatres Act* that apprentice projectionists work under the supervision of licensed projectionists, could not operate the projection equipment alone. The employer used a second manager, who was not eligible to work during the strike because he had been transferred into the struck location, to provide the necessary supervision. The second manager did not actually operate the projection equipment. The union applied to the OLRB under section 73.1 to prohibit the second manager from supervising the first. Based on the language in the collective agreement and the craft jurisdiction of the union, the OLRB decided that the supervision of apprentice projectionists was bargaining unit work even though it was not normally done by the union members. Therefore, in the first *Famous Players* decision, the

OLRB decided that the transferred manager could not supervise the apprentice projectionist under section 73.1.⁵²

In the second *Famous Players* decision⁵³, the employer had in the interim trained the assistant manager in question who had obtained her license to operate the projection equipment. In order to accomplish that training, she had been moved to Montreal for two months. When the employer returned her to Kitchener to work during the ongoing strike, the union brought a second section 73.1 application arguing that she had now been transferred into the struck location and was no longer eligible to work. The OLRB agreed with this argument and found that the assistant manager had been transferred out of the struck location and in again and so was no longer eligible to work under the legislation. The OLRB took a very broad approach to interpreting the word "transfer" since the assistant manager had not been transferred within the employer's own definition of the term but had merely been temporarily assigned to another location for training purposes.

The two *Famous Players* cases indicate the expansive approach taken by the OLRB to the interpretation of the replacement worker provisions and the extent of the restriction imposed on the employer's ability to operate. Again, the employer's attempts to operate one theatre with existing managers could hardly be equated with the hiring of replacement workers.

- **Marriott Management Services at Queen's University Strike**

This strike involved 68 full-time employees of Marriott's food services operations at Queen's University. Notice to bargain was given in respect of the full-time bargaining unit on April 8, 1993. The strike did not commence until a year later on April 11, 1994.

The employer attempted to continue operations with its complement of part-time employees and managers and supervisors. The 150 part-time employees also were on strike between April 16, 1994 and May 17, 1994 at which time Marriott ended the strike by applying for first agreement arbitration.

The managerial group included six persons who had been hired or transferred into the jobs of managers who were working when notice to bargain was delivered a year earlier but had since left the company. All six had been hired or transferred by Marriott to fill the vacant supervisory positions at Queen's during the ordinary course of business. No

⁵²*International Alliance of Theatrical Stage, Employees and Moving Picture Operators, Local 357 v. Famous Players Inc.* [1993] OLRB Rep. December 1270 (MacDowell).

⁵³*International Alliance of Theatrical Stage, Employees and Moving Picture Operators, Local 357 v. Famous Players Inc.* [1994] OLRB Rep. Feb. 131 (Liang).

new positions were created; in fact there had been a reduction in the total complement of managers since notice to bargain was given.

The union brought a section 73.1 application to prevent the six managers and supervisors from working. The employer argued before the OLRB that the purpose of section 73.1 was not defeated by the filling of vacancies in pre-existing positions so long as there was no net increase in the number of managers.

The OLRB ruled that each of the persons in dispute had been "hired" or "transferred" after notice to bargain was given and were therefore precluded from working under the law. The OLRB said that to interpret the wording of section 73.1 differently "would be to thwart the obvious intent of the Legislature".⁵⁴

In a strongly worded dissent, Board Member J.A. Rundle noted her objection to this result:

2. **The *Labour Relations Act* was premised on a system of economic sanctions in which *both* parties had much to lose through confrontation and everything to gain by compromise. The former Act restricted the use of economic sanctions but did not prohibit them. The right to strike or lock-out, and the employer's ability to stand a strike are basic features of Ontario's industrial relations systems. In 1968 the Woods Task Force reported that:**

As noted elsewhere, the employer's economic sanction equivalent to the union's right to strike rarely is the lock-out. It is his ability to take a strike. ... However, it is important to note that an employer's capacity to take a strike depends largely on his right to stockpile goods in advance of a strike and to use other employees and replacements to perform work normally done by strikers. Together with the lock-out, these possibilities constitute the employer's *quid pro quo* for the employee's right to strike; this is as it should be in our view.

3. **The *Labour Relations Act* as amended by Bill 40 has almost completely eliminated the employer's economic sanction**

⁵⁴ *CUPE Local 229 v. Marriott Management Services*, [1994] OLRB Rep. June 729.

equivalent to the union's right to strike, thereby dramatically altering the balance of power in the Act. The reason given for the realignment of this balance of power was the belief that the failure to put restrictions on the use of replacement workers can lead to bitter and violent confrontations and reduce the willingness of both parties to engage in meaningful collective bargaining. However, I am unaware of any documentation supporting the proposition that Ontario's experience with the picket line is in any way beyond the average. The province of Quebec has similar legislation which was preceded by a series of violent confrontations on the picket line. It is interesting to note that in the time frame in which this particular legislation has been in effect, Quebec has suffered a higher number of strikes than Ontario.

4. In the instant case we have a company which after notice to bargain was given, *reduced* its complement of managerial positions and over a period of months hired or transferred into those managerial vacancies the employees who are the subject matter of this application. None of the six individuals in question occupy bargaining unit positions and all, up until the time of the strike, were doing the work contained in their specific job descriptions. These employees were never hired as substitute labour or replacement workers as understood in the labour relations sense. At no time immediately before or after the strike did the employer seek to increase the complement of managers within its organization. Rather the employer maintained the status quo that was in existence prior to the commencement of the strike, and ran the operation during the strike utilizing only those people in the pre-existing managerial positions.
5. It was clearly the intent of the Legislature to inhibit an employer's ability to carry on business during a strike, as evidenced by the manner in which section 73.1 is written. Any employer who during the course of a strike has a manager die, discharges a manager for just cause, discharges a manager for violation of any statute (including the Human Rights Code and the Occupational Health and Safety Act), or has a manager quit, can hire or transfer someone to fill that vacancy, but is prohibited from using him or her to perform any work of the bargaining unit for the duration of the strike. Although that is clearly the intent of the legislation,

in my view it makes little labour relations sense and creates an obvious inequity which the Board is unfortunately not in a position to redress.⁵⁵

Again, the impact of section 73.1 on this lengthy strike can be seen to far exceed the stated objective of prohibiting the use of "replacement workers". The employer's complement of supervisors eligible to work was slowly being depleted by attrition.

•Labatts Ontario Breweries Strike

Another impact of the Ontario legislation is to give small but essential bargaining units the capability to shut down the employer's entire operation. For example, on April 11, 1994, a bargaining unit of ten engineers, members of the International Union of Operating Engineers, Local 772, began a strike at Labatts Ontario Breweries. There were 350 production employees at the same location represented by the Brewery, General and Professional Workers Union, Local 304, as well as 200 non-union office and administrative employees. The striking engineers, were required under the *Operating Engineers Act* to be present at all times while the company's power plant was in operation. The power plant at the brewery consisted of five systems: the steam plant, the compressor plant, the refrigeration plant, the carbon dioxide recycling system, and an electrical generation system. The power plant required 24-hour staffing by qualified engineers.

Labatts gave notice to the union under the specified replacement worker provisions of the legislation that it would require two engineers to perform the work of the union members in the event of a strike to enable it to prevent a danger to the lives, health and/or safety of Labatt employees and to prevent the destruction or serious deterioration of the company's machinery and equipment. A strike commenced on April 17, 1994. The union refused to consent to the use of specified replacement workers. Labatts replaced the striking engineers with two managers and a third engineer from a non-struck location. The union sought an OLRB order under section 73.2 preventing the use of the third engineer.

The OLRB agreed that the employer was entitled under the "emergency" exception in section 73.2 to keep the power plant operational and to have an engineer on duty as required for this purpose. However, because the employer had two qualified managerial employees who were able to operate the power plant legally under the *Operating Engineers Act*, the company's request for two additional specified replacement workers was denied. The OLRB did not see Labatts' request as a necessity but rather as a means to avoid the inconvenience and difficulty of scheduling the two managers to cover the 24-hour operation. Although the managers would be working 84 hours per week each, the OLRB

⁵⁵ *Ibid*, at p.737.

concluded that allowing two additional specified replacement workers as requested by the company would "virtually nullify the impact of the strike". The OLRB refused the company's request, stating that:

It is not uncommon for managerial employees to work harder during a strike; this is part of the pressure economic sanctions exert which the theory of collective bargaining presumes will encourage settlement. Undermining that pressure by using specified replacement workers to restore the working complement to close to normalcy is not consistent with the general thrust of section 73.1 and 73.2 either. We therefore concluded that specified replacement workers were not necessary within the meaning of section 73.2(3) at this point in time.⁵⁶

The OLRB also noted that it would not accept as a reason for providing specified replacement workers the employer's argument that it wished to avoid shutting down the brewery with the negative effect of causing a layoff of production and office employees. The OLRB stated that:

The fact that there may be a secondary or "domino" effect upon other bargaining units or employees is not unusual in labour disputes, and one which the Legislature obviously did not include in the list of exemption circumstances.

Therefore highly skilled employees occupying more pivotal positions are also likely to derive some benefit from the prohibition in section 73.1 if the overall impact on operations is more dramatic. In that case, there is nothing about these provisions which suggests that section 73.2(3) was intended to dilute that effect. ...⁵⁷

It can be seen that section 73.1 as drafted by the Ontario Legislature and as interpreted by the OLRB, has the potential to greatly increase industrial conflict. If the engineers on strike at Labatts were not required to be on duty for safety reasons, the section 73.2 exception would not have applied and the engineers could not have been

⁵⁶*International Union of Operating Engineers Local 772 v. Labatt's Ontario Breweries et al.*, OLRB June 30, 1994 (McCormack) at p.18.

⁵⁷ *Ibid*, at p.15.

replaced. In that case, if no managers were qualified to do the engineers' work, the unit of ten employees could have shut down the work of 550 other workers. Consider the effect of section 73.1 in a strike by a small unit of inspectors, drivers, mechanics or similar groups essential to the employer's operation. Ontario's labour law has consistently stood against "hot cargo" clauses and refusals to cross picket lines because of the negative impact on industrial peace. Section 73.1 creates the sort of "mushrooming" disruption which labour policy has traditionally attempted to prevent.

The Labatts case also shows that the "emergency" exception of section 73.2 which is drafted in a very narrow way, is also being interpreted very strictly by the OLRB. Requiring the employer to carry on with only two managers working created a real safety concern for the employer. Board Member W.A. Correll dissented from the OLRB's decision stating that:

I for one would not want to be part of a decision that put in jeopardy the safety of others both inside or outside of the plant. As noted in the award the two management replacement workers would be put under strain by working 84 hours per week. The longer that situation continued the more the risk there would be that one or both, through sheer exhaustion or illness would not be able to respond alertly to their responsibilities. Testing the reality of whether or not this was an unsafe situation is not a good way to manage. For these reasons I have concerns about how well this section was crafted as we see problems unfold that have not been anticipated or thoroughly thought through.⁵⁸

⁵⁸ *Ibid*, at p.22.

A Proposed Ban on Replacement Workers in the Federal Sector

An Overview of Our Concerns

by

The Canadian Chamber of Commerce

April, 1995

April 5, 1995

Dear Colleague:

We are pleased to provide you with a copy of this document which outlines the Canadian Chamber of Commerce's concerns with a recent proposal to ban the use of replacement workers during legal work stoppages in federally-regulated industries. As you know, the Canadian Chamber of Commerce is the nation's largest and most representative business association. It is the only national business group with a membership which covers the entire spectrum of private enterprise.

As issues arise, such as the current proposal to ban replacement workers, the Canadian Chamber is the only organization that brings business together to act as a powerful single voice. We speak for all business, from the smallest to the largest company, in every business sector and in every corner of the country. Our unique network of 500 community chambers and boards of trade across Canada provides the Canadian Chamber with affiliate partners in every federal MP's constituency.

Throughout the entire network, which includes companies, community chambers and boards of trade and more than 90 trade and professional associations, the Canadian Chamber brings together and speaks on behalf of a total membership of 170,000.

Concerns outlined in this document are ones that have been raised by you, the membership. On your behalf, we are raising these concerns directly to policy makers in Ottawa, as well as to the Canadian public and the media. Should you want more details on the issue from a business perspective, please let us know. We would be pleased to provide you with a copy of a full analytical report which we have recently prepared.

On behalf of the Canadian Chamber of Commerce, we thank you for your ongoing support in the important work we undertake.

Bernard R. Wilson, FCA
Chairman of the Board

Timothy E. Reid
President

A Proposed Ban on Replacement Workers in the Federal Sector

An Overview of our Concerns

The Canadian Chamber of Commerce agrees with the federal government that Canada's competitiveness in the global economy is to a large extent dependent on a "**sophisticated and efficient infrastructure**". Canada can take pride for the world-wide reputation of its modern transportation and communications networks.

Fully integrated with the United States, Canada's networks provide efficient and reliable access to businesses and consumers across North America. In fact, Canada's infrastructure rating remains among the highest of the G-7 nations.

It is no surprise, therefore, that **maintaining this infrastructure is a crucial element in Canada's attempts to encourage domestic and foreign investment as an engine of growth and job creation**. The federal government has stated that it is strongly committed to fostering a competitive environment in Canada, where investment is attracted, where companies flourish in a healthy business climate, and most importantly, where additional Canadian jobs are created and sustained.

Considering the above, the Canadian Chamber of Commerce must ask:

Why is the federal government seriously considering a proposal, that if implemented, would inhibit the ability of Canadian businesses to maintain consistent operations and would result in an ultimate endangerment of the national economy?

It has been proposed that changes to the Canada Labour Code should include the introduction of legislation to restrict the use of replacement workers in federally-regulated industries during legal work stoppages. While the precise content of the proposal remains under consideration, it is likely that the federal government intends to borrow a number of key features that currently exist in legislation of certain provinces.

Of utmost concern to the Canadian Chamber of Commerce and its members is a key section of the **proposal that would prohibit and/or restrict the use of transfers, bargaining unit and non-bargaining unit employees, new hires, and managers**.

The Chamber considers this proposal to be severely flawed and misguided, and represents grave risks to the national economy and Canada's global competitiveness. Furthermore, examination of

actual strike activity in Canada presents **convincing evidence that the government's rationale for considering this proposal is largely unfounded.**

The Unique Nature of the Federal Sector has been Disregarded

The government's proposal fails to take into account the unique nature of the federally-regulated sector. Federal sector businesses include many large, integrated networks spread across great distances, connected by air, rail, road or technology. These businesses constitute the infrastructure of the Canadian economy and include many essential services for which alternate sources of supply do not exist. **Any disruptions in these services have serious impacts on the ability of the Canadian economy to operate.**

Section 90 of the Canada Labour Code recognizes that these national services may be in the national interest, that a work stoppage may not be tolerable and that Parliament may be required to act with back-to-work legislation. History reminds us that Parliament, acting in the public interest, has often restricted a union's right to strike. The recent back-to-work legislation in the ports and rail sectors is evidence of the continued concern over national labour disputes and the economic consequences they entail.

Ironically, further limiting the ability of federally-regulated employers to operate during a strike would, in turn, lead to increased intervention by government through back-to-work legislation as services essential to the public and the economy are shut down.

The Government's Proposal Would Unfairly Disrupt the Current Balance of Power in Canada's Collective Bargaining System

Equally disturbing is that a ban on replacement workers creates a one-sided bargaining system in which the striking union can choose to shut down and inflict loss on the business indefinitely, regardless of the unreasonableness of the employees' demands. This is extremely destabilizing given that **management's right to operate is the quid pro quo for the union's right to strike.**

Evidence Shows that Replacement Ban Legislation Reduces Neither the Frequency nor Duration of Strike Activity

As of 1991 Canada, still had one of the worst stoppage records of the seven most industrialized countries of the world, second only to Italy. As such, **the Canadian Chamber of Commerce supports the federal government's desire to explore options which could foster a more harmonious labour relations environment in Canada.** However, it remains to be demonstrated how proposed restrictions on the use of replacement workers in the federal sector would accomplish this.

In fact, the experience in Quebec since 1977 when a ban on replacement workers was introduced, demonstrates that anti-strike breaker legislation is actually associated with a significantly large increase in both the number of strikes and their duration. The following figures show the stark contrast in strike activity between Ontario and Quebec during this period:

STRIKES, WORKERS INVOLVED AND TIME LOST IN QUEBEC AND ONTARIO ADJUSTED BY RELATIVE SIZE OF WORKFORCE		
1978 - 1992		
	Ontario	Quebec
Total number of strikes:	3,287	5,131
Total number of workers involved:	1,018,737	2,427,927
Total days lost:	23,124,840	30,926,227

The Chamber disagrees with the proposal to restrict the right of any striking workers from crossing a picket line, and returning to work. Enforcing a false solidarity in this manner shelters the union from legitimate dissent, potentially prolongs strikes and deprives individuals who disagree with the strike of their jobs and income indefinitely. **This important issue should not be masked by discussing the proposal as "anti-scab" legislation.**

A Healthy and Attractive Investment Environment in Canada is at Risk

Labour reform designed to give trade unions the unilateral power to shut down federally-regulated businesses would make Canada's "sophisticated and efficient infrastructure" vulnerable to constant disruptions. Such reform would be a retrograde step and threaten Canada's economic strategy in world markets. As has been seen recently, major disruptions to national services have an immediate and profound effect on the ability of Canada to quickly and smoothly supply export markets. **Any damage done to Canada's reputation worldwide as a reliable supplier has negative implications for Canada's export drive.**

The Canadian Chamber of Commerce firmly believes that a ban on replacement workers is the sort of labour legislation which sends absolutely the wrong message to potential investors. Therefore, the Chamber asks the question:

Does the federal government seriously believe that banning replacement workers during a strike would actually improve our competitive position on the world stage?

The Canadian Chamber is extremely concerned that the passage of such legislation, at the federal level, could negatively influence future decisions to invest in Canada, or source from Canadian suppliers. A potentially "unreliable" national transportation infrastructure and the implications within North America of an actual interruption in service are of grave concern. Recent work stoppages in the ports and rail sectors clearly demonstrate the devastating and immediate effects such disruptions have on a variety of industries, such as the automotive sector.

Adding to the Chamber's concerns is that once the option of operating during a strike is removed, the option of transferring operations or shifting production out of Canada becomes more likely. It is, therefore, predictable that this one-sided tilting of the balance of power in collective bargaining would lead to less competitive business, an increase in strike incidence and duration, and loss of investment in Canada.

The employer faced with the possibility of a strike and an inability to operate naturally seeks to make alternate arrangements to supply customers and secure the business. Contracting out of bargaining unit work, relocation of operations, shifting production to other facilities, diverting investment and reinvestment out of Canada are all options the employer is forced to consider by such legislation.

Furthermore, in facing the competitive challenges being brought about by an increasingly globalized economy, employers must retain the bargaining strength to negotiate necessary changes to keep their operations competitive. If as a result of legislative intervention, the employer loses this ability to negotiate change, the business would simply not meet its vital operational targets.

In addition, when an employer is legitimately attempting to weather a strike brought about by unreasonable union demands and bargaining conduct, a further handicap imposed by law may be the final blow to an employer's business. In the well-publicized Giant Mine labour dispute in the N.W.T., if the employer had been forced by law to shut down the mine, the evidence suggests that **the company might have been forced out of business, although it had initially bargained in good faith and reached a tentative agreement.**

If the current proposal becomes a reality, the obvious result is that a growing number of businesses would falter within Canada. As alarming, would be their need to act upon "escape" strategies, whereby companies now located in Canada relocate, shifting production or diverting new investment or reinvestment. This is particularly true for portable and multi-location operations. The ultimate consequence would be an unresponsive industrial relations system, within a withering national economy. **Other competing jurisdictions, such as the United States, would be the beneficiaries of the Canadian failures.**

The proposal to ban casual or temporary replacements and to restrict the use of existing managers, non-bargaining unit employees and dissenting bargaining unit members during a strike, stands in sharp contrast to the United States position. In fact, in the United States, the issue is not whether an employer has the right to operate its business, including the right to hire new workers. The issue in the U.S. has been whether replacements are temporary or permanent and whether workers may lose their jobs as a result of a strike. The right of striking workers in Canada to return to their jobs over temporary workers is well accepted. However, **the current proposal is of concern as it would intensify the degree to which Canada is out of step with its major trading partner.**

With the restrictive replacement worker legislation currently found in Quebec, Ontario and British Columbia, it appears that these **provinces have the distinction of being the only jurisdictions world-wide which restrict the employer's right to keep its business operating even with existing employees.**

The Canadian Chamber of Commerce submits that the federal government should look to the mainstream, namely the industrialized nations of the world with whom we participate in the global economy, for an appropriate standard as opposed to provincial legislation which many believe will not survive the test of time.

Removing the Employer's Right to Operate as a Method of Violence Prevention is Unprincipled.

A key rationale used in the federal government's current proposal to legislate a federal ban on replacement workers is that this would eliminate a major cause of tension in labour disputes. The rationalization is that, with less tension, the incidence of violence will be prevented during strikes. However, this justification is shown to be unsupported by fact.

The Canadian Chamber of Commerce contends that **the only legitimate method of preventing and controlling violence during a labour dispute lies in the regulation of picket line conduct by unions, the police, the courts and labour boards.**

The law of picketing is premised on the assumption that picketing will be undertaken peacefully to demonstrate protest while the employer continues to operate its business. This assumption does not accord with the reality that to varying degrees, the picket line is prone to misconduct and violence.

On closer examination, it becomes clear that the potential for violence is inherent in the picket line itself. In principle, violence is connected more closely with the strike and the picket line, particularly mass picketing, than it is connected with the use of replacement workers. Therefore, the argument can be made that **any violence which occurs is largely a result of the picket line itself.**

Violence, whether acts of property damage, sabotage or assault, is unlawful, criminal behaviour. **While it is important to prevent violence where possible, the employer's lawful right to have access to its building and property and to protect its market share, customers and the survival of its business, indeed the survival of the jobs to which strikers will eventually return, cannot be viewed sensibly as a mere provocation to violence by strikers.**

The link between the picket line, particularly mass picketing, and violence is clear. It is the inadequately regulated picket line which is the proximate cause of violence in labour disputes. **It is the inherent intimidation and propensity to violence in the unlawful or unregulated picket line which should be the focal point of efforts to prevent violence.**

In fact, violent labour disputes remain part of the Quebec scene, the province where a ban on replacement workers has been in place the longest. Examples of strike violence in Quebec that received much public attention in recent years include the 1990 rotating strikes by 14,000 Hydro-Quebec workers, and the 1991-92 strike by 1,500 Montreal municipal workers.

There is a Strong Need for Better Regulation of Picket Line Activity

It is important to remember that it is not lawful in any western jurisdiction, for mass picketing, by relatively large numbers in close ranks or in group formation **to effectively obstruct entrance to a plant or business.**

However, intimidation and coercion are inherent in the picket line. While the picket line's real purpose is to peacefully communicate information to the public, often it leads to an obstruction of access to the employers' premises.

The police view their primary role in a labour dispute as one of peace-keeping, which can result in the interests of keeping the peace to be placed ahead of strict enforcement of the law. This response is reasonable and as effective as budgetary and manpower constraints allow. However, **The Chamber believes that a ban on replacement workers in the federal sector would tend to reinforce a belief by unions that picketers have a right to obstruct persons attempting to gain access to a struck enterprise.**

Labour is the party responsible for maintaining discipline and conducting a lawful picket line, and is therefore the party most able to prevent violence in labour disputes. When violence occurs, it is often an indirect consequence of mass picketing or unlawful picketing methods. Therefore, **the primary method of violence prevention in labour disputes should be the proper regulation of picket lines through restricting numbers of picketers and holding union leaders accountable for the conduct of picketers.**

It is also useful to consider that where employer misconduct underlies a hard bargaining stance, namely an attempt to avoid reaching a collective agreement or to undermine the union's recognition rights, the appropriate Canadian Labour Relations Board (CLRB) remedy may indirectly prevent violence.

In the final analysis, the prevention of violence lies in the regulation of the picket line. Unions must exert control and discipline over their striking members, and not derive benefit at the bargaining table because of violent incidents. **Unions with well organized and disciplined workers, capable of controlling their supporters, are better able to control violent reactions** Employers, in turn, must recognize and respect the legitimacy of peaceful information picketing in support of a lawful strike.

Conclusions

The Canadian Chamber of Commerce is convinced that the government's replacement ban proposal is misguided, unwarranted, and runs counter to their jobs and growth strategy. The proposal disregards the unique nature and importance of federally-regulated businesses. The proposal also signifies a dangerous shift in the balance of power in Canada's labour relations, with the evidence suggesting that implementation of such a proposal could in fact result in an actual increase in strike incidence and duration.

The overall concern is the threat that this proposal would place on the ability of Canada to remain competitive and continue to encourage investment and reinvestment. The proposal would lead to negative consequences that are national in dimension and are, therefore, of national concern. The federal government's obligation to protect the public interest should deter it from such reform.

The existing collective bargaining system, imperfect as it might be, has served Canada well in these turbulent times which are dominated by global economic competition and massive restructuring. The declining national strike rate and the trend towards more competitive labour costs are but two developments that point to the continuing value of the current collective bargaining system, and more precisely, the ability of the labour market parties, within that system, to move in a direction that is in the national interest.

The wisdom of recasting a system that has achieved laudable results under very difficult circumstances, is not readily apparent. On the contrary, a very real danger exists that ideologically-driven legislative reform of the kind contemplated by the federal government, will be viewed in a negative light by investors, instead of advancing Canada's competitive position.

Studying actual strike activity reveals that the connection between replacement workers and violence has not been established. Furthermore, if the objective is to prevent violence, the target should be control of the picket line and holding union officers responsible for maintaining discipline and controlling numbers of picketers. If the current proposal were implemented, it would tend to reinforce a belief that strikers have a right to obstruct access to a company's property.

Restrictions on the employer's ability to operate during a strike where the employer's purpose is to undermine the union's recognition rights may merit consideration as part of a review of the Canada Labour Relations Board's remedial authority. However, the Canadian Chamber of Commerce urges the federal government not to proceed with any other reform concerning replacement workers.

Sources for the newspaper article excerpts that appear on the front cover are:

"\$5 billion loss feared from railway dispute", The Vancouver Sun, March 21, 1995

"Le port est fermé", La Presse, March 8, 1995

"Ottawa appoints mediator in Montreal port dispute, The Financial Post, March 21, 1995

"West coast ports shut down as longshoremen strike", The Vancouver Sun, March 14, 1995

"Costly rail strike has hurt our reputation abroad", The Financial Post, March 29, 1995

**Projet d'interdiction des travailleurs de
remplacement dans le secteur fédéral**

Vue d'ensemble de nos préoccupations

par

La Chambre de Commerce du Canada

Avril, 1995

Le 5 avril 1995

Cher collègue,

Nous sommes heureux de vous remettre un exemplaire de ce document, qui expose les préoccupations inspirées à la Chambre de Commerce du Canada par une récente proposition d'interdire le recours aux travailleurs de remplacement pendant les arrêts de travail légaux dans les industries sous réglementation fédérale. Comme vous le savez, la Chambre de Commerce du Canada est la plus grande et la plus représentative des associations de gens d'affaires au pays. Elle est le seul groupe d'affaires national à recruter ses membres dans toute la gamme des entreprises privées.

Lorsque de nouveaux dossiers, comme l'actuelle proposition d'interdire les travailleurs de remplacement, entrent dans l'actualité, la Chambre de Commerce du Canada est le seul organisme capable de concerter le monde des affaires et de parler pour lui d'une même voix forte. Nous parlons pour toutes les entreprises, de la plus petite à la plus grande, de chaque secteur d'activité et de chaque coin du pays. Notre réseau bien particulier de 500 chambres et *boards of trade* au Canada donne à la Chambre de Commerce du Canada des partenaires affiliés dans la circonscription de chaque député fédéral.

Dans l'ensemble du réseau, qui regroupe des entreprises, des chambres et *boards of trade* locaux et plus de 90 associations commerciales et professionnelles, la Chambre de Commerce du Canada regroupe un total de 170 000 membres, dont elle est le porte-parole.

Les préoccupations exposées dans ce document sont celles que vous, nos membres, avez soulevées. En votre nom, nous en saisissons directement les décideurs d'Ottawa, ainsi que le public canadien et les médias. Si vous voulez plus de détails sur la question dans une perspective d'affaires, faites-le nous savoir. Nous serions heureux de vous adresser un exemplaire d'une analyse complète que nous avons préparée récemment.

Au nom de la Chambre de Commerce du Canada, nous vous remercions de votre appui constant dans l'important travail que nous menons.

Le président du Conseil,

Bernard R. Wilson, FCA

Le président,

Timothy E. Reid

Projet d'interdiction des travailleurs de remplacement dans le secteur fédéral

Vue d'ensemble de nos préoccupations

La Chambre de Commerce du Canada reconnaît avec le gouvernement fédéral que la compétitivité du Canada dans l'économie mondiale est dans une large mesure tributaire d'une «**infrastructure complexe et efficiente**». Le Canada peut s'enorgueillir de la réputation mondiale de ses réseaux modernes de transport et de communications.

Pleinement intégrés avec ceux des États-Unis, les réseaux du Canada assurent un accès efficient et fiable aux entreprises et aux consommateurs de toute l'Amérique du Nord. De fait, la cote de l'infrastructure du Canada demeure parmi les plus élevées des pays du G-7.

Il n'est donc pas étonnant que le **maintien de cette infrastructure est un élément des efforts que fait le Canada pour promouvoir l'investissement intérieur et étranger comme moteur de croissance et de création d'emplois**. Le gouvernement fédéral a pris résolument le parti de la promotion d'un environnement concurrentiel au Canada, qui attirera l'investissement, où un climat d'affaires sain favorisera l'essor des entreprises et, chose plus importante encore, qui facilitera la création et le maintien de nouveaux emplois.

Compte tenu de ce qui précède, la Chambre de Commerce du Canada doit demander :

Pourquoi le gouvernement fédéral étudie-t-il sérieusement une proposition dont la mise en oeuvre diminuerait la capacité des entreprises canadiennes de maintenir leurs opérations et finirait par compromettre l'économie nationale?

Selon la proposition, les changements au Code canadien du travail devraient comprendre le dépôt d'une mesure législative restreignant le recours aux travailleurs de remplacement dans les industries sous réglementation fédérale pendant les arrêts de travail légaux. Bien que le contenu précis de la proposition demeure à l'étude, le gouvernement fédéral a, selon toute vraisemblance, l'intention d'emprunter plusieurs caractéristiques essentielles à la législation actuelle de certaines provinces.

La Chambre de Commerce du Canada et ses membres se préoccupent au plus haut point d'un article clé de **la proposition qui interdirait et (ou) restreindrait le recours aux mutations, à des employés de l'unité de négociation et d'autres unités de négociation, à des employés nouvellement embauchés et aux cadres**.

Aux yeux de la Chambre, cette proposition est gravement tarée et mal inspirée, et compromet sérieusement l'économie nationale et la compétitivité mondiale du Canada. En outre, l'analyse des événements qui ont marqué les grèves au Canada présente **une preuve convaincante que le raisonnement par lequel le gouvernement justifie l'étude de cette proposition est essentiellement non fondé.**

On a oublié le caractère particulier du secteur fédéral

La proposition du gouvernement ne tient pas compte du caractère particulier du secteur sous réglementation fédérale. Les entreprises du secteur fédéral comprennent de nombreux grands réseaux intégrés, couvrant de vastes distances, reliés par le transport aérien, ferroviaire ou routier ou par la technologie. Ces entreprises, qui sont l'infrastructure de l'économie canadienne, comprennent de nombreux services essentiels pour lesquels il n'existe pas d'autres sources d'approvisionnement. **Toute perturbation de ces services a de sérieuses répercussions sur la capacité de fonctionner de l'économie canadienne.**

L'article 90 du Code canadien du travail reconnaît que ces services nationaux peuvent être dans l'intérêt national, qu'un arrêt de travail peut ne pas être tolérable et que le Parlement peut être appelé à intervenir par une loi de retour au travail. L'histoire nous rappelle que le Parlement, agissant dans l'intérêt public, a souvent limité le droit de grève d'un syndicat. Les récentes lois de retour au travail dans les secteurs portuaire et ferroviaire est la preuve du souci constant qu'inspirent les conflits du travail nationaux et les conséquences économiques qu'ils entraînent.

Ironiquement, une limitation plus rigoureuse de la capacité des employeurs sous réglementation fédérale de maintenir leurs opérations pendant une grève donnerait lieu, par ailleurs, à une multiplication des interventions du gouvernement par des lois de retour au travail en cas d'interruption de services essentiels au public et à l'économie.

La proposition du gouvernement fausserait injustement l'actuel rapport de force dans le système de négociation collective du Canada

Chose non moins troublante, l'interdiction des travailleurs de remplacement crée un système de négociation unilatéral où le syndicat en grève peut choisir de fermer l'entreprise et de lui infliger des pertes pour une période indéfinie, même si les demandes des employés sont tout à fait déraisonnables. Cela a un effet déstabilisateur extrême, étant donné que **le droit de l'employeur de maintenir ses opérations est la contrepartie du droit de grève du syndicat.**

La preuve démontre que la législation d'interdiction des travailleurs de remplacement ne réduit ni la fréquence ni la durée des grèves

En 1991, le Canada avait encore, en matière d'arrêts de travail, l'un des pires palmarès des sept pays les plus industrialisés du monde, venant immédiatement après l'Italie. Par conséquent, **la Chambre de Commerce du Canada appuie le désir du gouvernement fédéral d'explorer des options qui favoriseraient une plus grande harmonie du climat de relations de travail au Canada.** Cependant, il reste à démontrer comment les restrictions proposées visant le recours aux travailleurs de remplacement dans le secteur fédéral permettraient d'atteindre ce but.

De fait, l'expérience du Québec depuis 1977, année où cette province a commencé à interdire les travailleurs de remplacement, démontre que la législation antibriseurs de grève est effectivement associée à une augmentation considérable du nombre de grèves et de leur durée. Les chiffres ci-après font voir le contraste marqué de l'activité de grève entre l'Ontario et le Québec pendant cette période :

GRÈVES, TRAVAILLEURS TOUCHÉS ET TEMPS PERDU AU QUÉBEC ET EN ONTARIO CORRIGÉS DE LA TAILLE RELATIVE DE LA MAIN-D'ŒUVRE		
1978 - 1992		
	Ontario	Québec
Nombre total de grèves :	3 287	5 131
Nombre total de travailleurs touchés :	1 018 737	2 427 927
Nombre total de jours perdus :	23 124 840	30 926 227

La Chambre n'est pas d'accord sur la proposition de restreindre le droit des grévistes de franchir un piquet de grève, et de rentrer au travail. Cette façon d'imposer une fausse solidarité met le syndicat à l'abri des dissidences légitimes, risque de prolonger les grèves et prive indéfiniment de leur emploi et de leur revenu les travailleurs qui ne sont pas d'accord sur la grève. **Il ne faut pas masquer cette importante question en présentant la proposition comme mesure «antibriseurs de grève».**

La qualité et l'intérêt du climat d'investissement au Canada sont menacés

La réforme du travail destinée à donner aux syndicats le pouvoir unilatéral de fermer des entreprises sous réglementation fédérale exposerait à des perturbations constantes l'«infrastructure complexe et efficiente» du Canada. Cette réforme serait un pas en arrière et une atteinte à la stratégie économique du Canada sur les marchés mondiaux. Comme on l'a vu récemment, les grandes perturbations des services nationaux ont un effet immédiat et profond sur la capacité du Canada d'approvisionner rapidement et harmonieusement les marchés d'exportation. **Toute atteinte à la réputation du Canada dans le monde comme fournisseur fiable a des retombées négatives sur l'effort d'exportation du Canada.**

La Chambre de Commerce du Canada croit fermement qu'une interdiction des travailleurs de remplacement est le genre de législation du travail qui envoie aux investisseurs éventuels le message qu'il ne faut absolument pas. Par conséquent, la Chambre demande :

Le gouvernement fédéral croit-il vraiment que l'interdiction des travailleurs de remplacement pendant une grève améliorerait effectivement notre compétitivité sur la scène mondiale?

La Chambre de Commerce du Canada craint au plus haut point que l'adoption de cette mesure, au niveau fédéral, n'ait des répercussions négatives sur les décisions futures d'investir au Canada, ou d'acheter à des fournisseurs canadiens. Une infrastructure nationale de transport qui risque d'être «peu fiable» et les incidences en Amérique du Nord d'une interruption effective du service préoccupent au plus haut point. Les arrêts de travail récents dans les secteurs portuaire et ferroviaire démontrent clairement les effets dévastateurs et immédiats que ces perturbations ont sur diverses industries, comme le secteur automobile.

Autre préoccupation de la Chambre, le retrait de l'option de maintenir les opérations en cas de grève rend d'autant plus alléchante l'option du transfert des opérations ou de l'envoi de la production en dehors du Canada. Il faut donc prévoir que cette intervention dans le rapport de force de la négociation collective provoquerait une perte de compétitivité pour l'entreprise, une augmentation de la fréquence et de la durée des grèves, et la perte d'investissements au Canada.

Devant la perspective d'une grève et de l'incapacité de maintenir ses opérations, l'employeur cherche naturellement à prendre d'autres dispositions pour approvisionner ses clients et protéger son entreprise. La sous-traitance du travail de l'unité de négociation, la relocalisation des opérations, le transfert de la production à d'autres usines, le détournement de l'investissement et le réinvestissement en dehors du Canada sont autant d'options que cette mesure législative forcera l'employeur à envisager.

En outre, face aux défis de compétitivité que représente une économie de plus en plus mondialisée, les employeurs doivent conserver leur pouvoir de négociation pour négocier les changements nécessaires pour protéger la compétitivité de leurs opérations. Si, du fait d'une intervention

législative, l'employeur perd la capacité de négocier le changement, l'entreprise ne pourra tout simplement pas atteindre ses objectifs opérationnels cruciaux.

En outre, lorsqu'un employeur tente légitimement de tenir le coup pendant une grève déclenchée par des demandes syndicales et une négociation déraisonnables, un handicap supplémentaire imposé par la loi pourrait représenter le coup fatal pour son entreprise. Dans le conflit du travail bien connu de la Giant Mine dans les T.N.-O., si l'employeur avait été forcé par la loi de fermer la mine, tout indique que **la société aurait pu devoir fermer ses portes, même si elle avait au départ négocié de bonne foi et conclu un accord provisoire.**

Si la proposition actuelle devient réalité, le résultat manifeste est qu'un nombre croissant d'entreprises au Canada ne survivront pas. Chose non moins alarmante, elles devraient appliquer leurs stratégies «de sauvegarde», en se relocalisant, en transférant leur production ou en détournant l'investissement nouveau ou le réinvestissement. C'est particulièrement le cas des opérations transférables et à emplacements multiples. La conséquence ultime serait un système rigide de relations industrielles, dans une économie nationale en déclin. **D'autres pays concurrents, comme les États-Unis, seraient les bénéficiaires des disparitions d'entreprises canadiennes.**

La proposition d'interdire les remplaçants occasionnels ou temporaires et de restreindre le recours aux cadres en place, à des employés d'autres unités de négociation et aux membres dissidents de l'unité de négociation pendant une grève présente un contraste marqué avec la position des États-Unis. De fait, aux États-Unis, la question n'est pas de savoir si l'employeur a le droit de maintenir ses opérations, y compris le droit d'embaucher de nouveaux travailleurs. Aux États-Unis, la question est de savoir si les travailleurs de remplacement sont temporaires ou permanents et si la grève peut coûter leurs emplois à des travailleurs. Le droit des grévistes au Canada de reprendre leurs emplois aux travailleurs temporaires est bien reconnu. **Cependant, la proposition actuelle préoccupe, car elle intensifierait la mesure dans laquelle le Canada est déphasé face à son premier partenaire commercial.**

Avec la législation restrictive actuelle touchant les travailleurs de remplacement au Québec, en Ontario et en Colombie-Britannique, il semble que ces **provinces soient les seuls territoires au monde à restreindre le droit de l'employeur de maintenir ses opérations commerciales même avec ses employés existants.**

La Chambre de Commerce du Canada fait valoir que le gouvernement doit regarder ce qui se passe dans le grand courant, c'est-à-dire dans les pays industrialisés du monde avec qui nous participons à l'économie mondiale, pour trouver une norme appropriée différente de la législation provinciale, qui, de l'avis d'un grand nombre, ne résistera pas à l'épreuve du temps.

Le retrait du droit de l'employeur de maintenir ses opérations comme méthode de prévention de la violence n'est pas fondé.

Une justification essentielle que retient la proposition actuelle du gouvernement fédéral d'interdire les travailleurs de remplacement est que cela ferait disparaître une importante cause de tension dans les conflits du travail. Selon ce raisonnement, la diminution des tensions fera diminuer la fréquence de la violence en cas de grève. Cependant, il a été démontré que cette justification est sans fondement dans les faits.

La Chambre de Commerce du Canada soutient que **la seule méthode légitime de prévenir et de contrôler la violence pendant un conflit du travail est la réglementation du piquetage par les syndicats, la police, les tribunaux et les régies du travail.**

La loi du piquetage part du principe que le piquetage est une activité pacifique de protestation pendant que l'employeur poursuit son exploitation. Cette hypothèse ne s'accorde pas avec la réalité selon laquelle, à des degrés variables, la ligne de piquetage est une occasion d'inconduite et de violence.

Un examen plus serré fait ressortir clairement que le potentiel de violence est inhérent au piquet de grève même. En principe, la violence est plus étroitement reliée à la grève et au piquet de grève, particulièrement au piquetage massif, qu'au recours aux travailleurs de remplacement. Par conséquent, on peut faire valoir que **toute violence qui survient est essentiellement la conséquence du piquet de grève même.**

La violence, sous forme d'endommagement des biens, de sabotage ou d'assaut, est un comportement illégal et criminel. **Bien qu'il importe de prévenir la violence dans la mesure du possible, le droit légal de l'employeur d'accéder à ses locaux et à sa propriété et de protéger sa part de marché, ses clients et la survie de son entreprise, voire la survie des emplois que les grévistes finiront par reprendre, ne saurait être perçu comme une simple provocation des grévistes.** Le lien entre le piquet de grève, et particulièrement le piquetage massif, et la violence est clair. C'est la mauvaise réglementation du piquet de grève qui est la cause prochaine de violence dans les conflits du travail. **C'est l'intimidation inhérente et la propension à la violence sur le piquet de grève illégal ou non réglementé qui devraient être le point de mire des efforts de prévention de la violence.**

De fait, les conflits du travail violents caractérisent encore la scène du Québec, province où l'interdiction des travailleurs de remplacement est appliquée depuis le plus longtemps. Au nombre des exemples de violence de grévistes au Québec qui ont le plus retenu l'attention publique ces dernières années, il faut compter les grèves tournantes de 14 000 travailleurs d'Hydro-Québec en 1990, et la grève de 1 500 travailleurs municipaux de Montréal en 1991-1992.

Une meilleure réglementation du piquetage est indispensable

Il importe de se rappeler qu'il n'est pas légal, où que ce soit dans le monde occidental, **de bloquer effectivement l'entrée d'une usine ou d'une entreprise** par un piquetage massif faisant appel à des nombres relativement considérables de grévistes en rangs serrés ou en formations de groupe.

Cependant, l'intimidation et la coercition sont inhérentes au piquet de grève. Bien que l'objet véritable du piquet de grève soit d'informer pacifiquement le public, le piquetage donne souvent lieu à l'interdiction d'accès aux locaux de l'employeur.

Dans un conflit du travail, la police considère que son rôle premier est le maintien de la paix, de sorte que les intérêts du maintien de la paix priment parfois sur l'application rigoureuse de la loi. Cette réaction est raisonnable et aussi efficace que le permettent les contraintes de finances et de ressources humaines. Cependant, **la Chambre croit qu'une interdiction des travailleurs de remplacement dans le secteur fédéral aurait tendance à renforcer la conviction syndicale que les piqueteurs ont le droit d'empêcher les personnes de tenter d'avoir accès à une entreprise victime d'une grève.**

Les syndicats sont la partie responsable du maintien de la discipline et de l'organisation d'un piquet de grève légal, et donc la partie qui est le plus en mesure de prévenir la violence dans les conflits du travail. Lorsqu'il y a violence, elle est souvent la conséquence indirecte d'un piquetage massif ou de méthodes illégales de piquetage. Par conséquent, **la principale méthode de prévention de la violence dans les conflits du travail devrait être la bonne réglementation des piquets de grève par la restriction du nombre de piqueteurs et le rejet sur les dirigeants syndicaux de la responsabilité de la conduite des piqueteurs.**

Il est aussi utile de considérer que, lorsque l'inconduite patronale sous-tend une position de négociation rigide, à savoir une tentative d'éviter d'en arriver à une convention collective ou de saper les droits de reconnaissance syndicale, le remède approprié du Conseil canadien des relations du travail (CCRT) peut être un moyen indirect de prévenir la violence.

En dernière analyse, le secret de la prévention de la violence est la réglementation du piquet de grève. Les syndicats doivent contrôler et discipliner leurs grévistes, et ne tirer aucun avantage, à la table de négociation, d'incidents violents. **Les syndicats de travailleurs bien organisés et bien disciplinés, qui sont capables de contrôler leurs partisans, sont mieux en mesure de contrôler les réactions violentes.** Les employeurs, par ailleurs, doivent reconnaître et respecter la légitimité du piquet d'information pacifique à l'appui d'une grève légale.

Conclusions

La Chambre de Commerce du Canada est convaincue que la proposition gouvernementale d'interdiction des travailleurs de remplacement est mal inspirée, injustifiée, et contraire à sa stratégie de création d'emplois et de croissance de l'emploi. La proposition ne tient pas compte de l'importance et du caractère particuliers des entreprises sous réglementation fédérale. La proposition représente aussi une dangereuse perturbation du rapport de force dans les relations de travail du Canada, la preuve révélant que la mise en œuvre de cette proposition risquerait de provoquer une augmentation effective de la fréquence et de la durée des grèves.

La préoccupation d'ensemble est la menace que cette proposition ferait planer sur la capacité du Canada de conserver sa compétitivité et de continuer d'encourager l'investissement et le réinvestissement. La proposition entraînerait des conséquences négatives qui sont nationales par leur dimension et qui sont donc une préoccupation nationale. L'obligation du gouvernement fédéral de protéger l'intérêt public devrait lui faire rejeter cette réforme.

Malgré toutes ses imperfections, l'actuel système de négociation collective a bien servi le Canada en ces temps de turbulence qui sont dominés par la concurrence économique mondiale et la restructuration massive. Le recul du taux de grève national et la tendance à une plus grande compétitivité des coûts de main-d'œuvre ne sont que deux phénomènes qui confirment la valeur continue de l'actuel système de négociation collective et, plus précisément, la capacité des intervenants du marché du travail, dans ce système, de prendre une orientation qui soit dans l'intérêt national.

Il n'est pas évident qu'il soit sage de refaire un système qui a donné des résultats louables dans des circonstances pénibles. Bien au contraire, il existe un danger réel qu'une réforme législative d'inspiration idéologique du genre de celle qu'envisage le gouvernement fédéral soit vue d'un mauvais œil par les investisseurs plutôt que de favoriser la compétitivité du Canada.

L'étude de l'activité de grève révèle qu'on n'a pas établi de lien entre les travailleurs de remplacement et la violence. En outre, si l'objectif est de prévenir la violence, la cible devrait être de contrôler le piquet de grève et de tenir les dirigeants syndicaux responsables du maintien de la discipline et du contrôle des nombres de piqueteurs. Si la proposition actuelle est mise en œuvre, cela aura tendance à renforcer la conviction que les grévistes ont le droit de bloquer l'accès à la propriété d'une entreprise.

Les restrictions de la capacité de l'employeur de maintenir ses opérations pendant une grève là où la stratégie patronale est de saper les droits de reconnaissance syndicale méritent peut-être d'être étudiées dans le cadre d'une revue du pouvoir de redressement du Conseil canadien des relations du travail. Cependant, la Chambre de Commerce du Canada incite le gouvernement fédéral à ne pas aller de l'avant avec quelqu'autre réforme concernant les travailleurs de remplacement.

Les sources des extraits d'articles de journaux qui figurent sur la couverture sont les suivantes :

«\$5 billion loss feared from railway dispute», The Vancouver Sun, 21 mars 1995

«Le port est fermé», La Presse, 8 mars 1995

«Ottawa appoints mediator in Montreal port dispute», The Financial Post, 21 mars 1995

«West coast ports shut down as longshoremen strike», The Vancouver Sun, 14 mars 1995

«Costly rail strike has hurt our reputation abroad», The Financial Post, 29 mars 1995

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