



**NLEC SUBMISSION TO THE  
VOISEY'S BAY INDUSTRIAL INQUIRY**

January 6, 2011



## TABLE OF CONENTS

NLEC Submission to the Voisey's Bay Project Site Industrial Inquiry.....	4
Appendix A - Negative Impacts of Anti-Replacement Worker Legislative Provisions.....	11
Appendix B - Final Offer Vote Statutory Provisions in Newfoundland and Labrador .....	23

# NLEC SUBMISSION TO THE VOISEY'S BAY PROJECT SITE INDUSTRIAL INQUIRY

## EXECUTIVE SUMMARY

The labour dispute in Voisey's Bay has moved away from the original issues surrounding the dispute and has become a political tool for organized labour in their efforts to achieve anti-replacement worker legislation. Anti-replacement worker legislation is anti-business legislation. The utilization of a local labour dispute for political gain by the United Steelworkers (USW) leadership and other parties external to the dispute, including the Federation of Labour and provincial NDP representatives, has served to make the dispute extremely divisive and has lengthened the strike.

The labour dispute in Voisey's Bay is also marked by the lack of a democratic secret ballot on the employer's offer. There is no direct evidence such as a secret ballot vote that would demonstrate that the employer's offer is currently unacceptable to the union membership. Unlike nine of the eleven other jurisdictions in Canada, there is no legislated provision in our provincial labour relations legislation to provide for this assurance. The disbursement of striking USW union members across the province and country, many of whom have found alternate employment, makes determining support for the union leadership's actions difficult to ascertain and is no doubt contributing to the length of this strike.

It is essential that the parties to this dispute be the architects of their own solution. To do otherwise only defers the problems to future disputes. Third parties including government, politicians and advocacy groups such as the Newfoundland and Labrador Federation of Labour should never make attempts to use a labour dispute between two parties as a mechanism for political gain. Doing so makes the process of reaching a settlement more difficult and threatens the labour relations climate in the province, impairs our ability to attract investment and weakens our ability to retain business production in this province.

This is a local dispute and as such the Newfoundland and Labrador Employers' Council (NLEC) is of the strong opinion that recommendations of the Industrial Inquiry Commission should be focused only on local solutions to this current labour dispute and not legislative change. Any suggested recommendations by the Commission for legislative change would extend to every unionized workplace in the province. These workplaces are not party to, or impacted by, the problems being experienced at Voisey's Bay nor are they experiencing similar issues. Recommended legislative change by the Industrial Inquiry Commission would carry significant political weight that could have long-lasting and far-reaching unintended negative consequences to our labour relations environment and the economy of this province. Legislative change is best achieved through other processes such as the current review of our Labour Relations Act through a tri-partite process involving employers, organized labour and government.

## **PREAMBLE**

The Newfoundland and Labrador Employers' Council is the lead business association in this province on matters that affect the employment relationship. We are an employer advocacy group that puts forward the opinion of employers on all matters that affect the employment relationship, including Labour Relations.

For almost 29 years we have been working to improve the labour relations climate in this province and as a consequence, the ability of employers to employee people. Our membership comes from all sectors and all regions of the province. Currently, our membership employs more than 50% of all non-government employees in this province.

This submission to the Industrial Inquiry Commission is made following consultation with and on behalf of our entire membership, unionized and non-unionized. We believe the recommendations this Commission makes have the potential to impact, not only our member Vale, but the entire workforce and economy of the province. Given the potential negative impacts on employers, the provincial economy and our ability to attract and retain business in the province, the NLEC has carefully considered and offers our perspective on each of the four issues for which written submissions are being sought by the Industrial Inquiry Commission.

### **1. The factors which have led to the existing labour-management relations climate at the Voisey's Bay project site in Labrador.**

The United Steelworkers have publicly opposed foreign ownership of resources and are active in the anti-globalization effort. In 2000, United Steelworkers along with other unions provided \$100,000 in funding to United Students Against Sweatshops, to support anti-globalization protests, as reported by Newsweek in April 2001. Prior to Vale's purchase of Inco in 2006, Wayne Fraser, the Ontario-Atlantic director with the union told CBC that he was disappointed there's a possibility that "there's going to be foreign ownership of our resources," saying this was "not good news" for Canadians.

The United Steelworkers Union has also been forging relationships with other international unions representing Vale employees. The intent of this, as stated by USW International President Leo W. Gerard is to "build unity among workers across the global nickel industry" in light of "the control of nickel mining and processing being put in the hands of a few, larger multinational companies." The USW began ongoing consultations with other Vale unions shortly after Vale concluded its deal for Inco. In March 2007, the United Steelworkers hosted a meeting of Vale unions including those from Brazil, Mozambique and New Caledonia where they approved a Unity Accord. In August 2008, the Canadian unions met in Manitoba with their Brazilian counterparts to discuss solidarity measures during contract negotiations. It was one year later that the strike occurred in Voisey's Bay.

In addition, throughout the current labour dispute The United Steelworkers Union has criticized

Vale publicly. In an article originally published on August 2, 2010 on the Republic of Mining website, Darren Cove, president of USW Local 9508 stated Vale has a “tradition of ruthlessly imposing its will on workers in developing countries.” Cove also commented publicly that Vale “treated its workers like second class citizens,” for which he was served papers for defamation.

The NLEC contends that these factors must have, and continue to, contribute significantly to the labour-management relations climate at the Voisey’s Bay site.

## **2. The identification of local, provincial, national or international matters that may be contributing factors in this dispute.**

### ***i. Local and provincial issues:***

#### ***(a) Anti Replacement Worker Campaign***

Organized labour is using the current labour dispute at the Voisey’s Bay project site as a public platform to lobby government to enact anti-business legislation that would ban the use of replacement workers during a labour dispute. The employer’s right to utilize replacement workers became the key, and sometimes only, message to government, the public and the union membership. This was perpetuated by in every media opportunity given by the United Steel workers representatives including Local 9508 president Darren Cove, NL Federation of Labour President Lana Payne and NDP leader Lorraine Michael. The NL Federation of Labour has stated publicly that it will use not only the existing dispute but the industrial inquiry itself to push for anti-replacement worker legislation. The messaging is no longer about the issues which led to the disagreement at the Voisey’s Bay project site. The political motive is to enact anti-business legislation affecting every unionized workplace (public and private) in the province. This messaging has created a divisive labour relations environment.

Anti-replacement worker provisions have been shown to have exceeding negative impacts on labour relations and business investment, retention and attraction. Employers cannot compromise in any way on such an anti-business provision. It is fundamentally flawed.

For a full analysis of the negative impacts of anti-replacement worker legislation see the NLEC’s Position Paper on this issue in Appendix A.

#### ***(b) Final Offer Vote***

The striking workers at Voisey’s Bay have not had the opportunity to democratically decide (by way of a secret ballot vote) on any of the offers put before the union by the company. The only vote that occurred was prior to the strike in 2009. In a strike that has lasted in excess of 16 months, it seems exceeding irresponsible and undemocratic that those most

impacted by the strike, the striking workers themselves, have not had opportunity of a secret ballot vote on any offers put forward by the Employer. It is unknown if the strike mandate that was given prior to August 2009 by the workers is still valid. The local union leadership at Voisey's Bay has a moral responsibility to ensure that the striking employees have the opportunity to vote on the offer from the Employer.

Nine of eleven jurisdictions in Canada recognize the need to ensure that employees have the opportunity to vote on an employer's offer during negotiations. Such provisions are typically called last offer vote or final offer vote provisions and serve to ensure that the union leadership is held accountable to their members during labour disputes. The inclusion of legislation providing for a final offer vote in almost all Canadian jurisdictions reflects the importance of a final offer vote as a valuable mechanism for resolving labour disputes in Canada. Since this legislation does not exist in Newfoundland and Labrador, there is no mechanism to ensure that the union leadership in the Voisey's Bay dispute is held accountable for their decision to keep their membership on strike. No evidence has been offered to demonstrate that during the strike the union leadership has maintained the majority support of the membership.

For a detailed analysis of the need for a Final Offer Vote legislative provision in Newfoundland and Labrador see the NLEC's positions paper in Appendix B.

(c) ***Geographic Disbursement of Striking Workers***

A significant portion of the striking workforce is not residing in one community. Many Vale employees are employed and/or residing elsewhere in communities in both Newfoundland and Labrador and in other provinces. It is doubtful that all striking workers have had equal opportunity to express opinions at meetings called by the union leadership in locations such as Goose Bay. The significant geographic disbursement of these workers and the obvious challenges this represents for two way communications concerning union leadership's actions in this labour dispute, casts doubt on the claim that the majority of the striking workers still support the job action. In fact, it has been reported that there are many days when the picket line has few, if any, striking employees on it.

(d) ***Binding Arbitration***

Binding arbitration has been suggested as a solution to this strike by USW Local 9508 president Darren Cove. Although the campaign for binding arbitration has not been at the same level as calls for anti-replacement worker legislation, binding arbitration as a solution to this dispute has been proposed by the USW.

Employers are rarely prepared to have a third party decide on a collective agreement. The act of negotiation and signing a collective agreement is a significant business decision, impacting the success and viability of the organization. As such, employers are rarely willing

to have such an agreement decided by an outside third party simply because an impasse is reached in negotiations. It is in the best interest of all parties to a dispute, the local labour relations climate and the labour relations climate of the province to have negotiated solutions to labour issues. Such agreements will have greater success at achieving long-term labour peace.

ii. ***National issues:***

The striking workers at Voisey's Bay are part of the United Steelworkers Union's national campaign for anti-replacement worker legislation. This campaign is being waged in several provinces including Ontario, Newfoundland and Labrador and at the Federal level. Nationally, the United Steelworkers Union is using the strike at Voisey's Bay as a platform to support their campaign for anti-replacement worker legislation in all Canadian jurisdictions. Statistically, Newfoundland and Labrador has the second highest unionization rate of any province in Canada. This makes our province a prime target for organized labour to lobby for a political decision in favour of anti-business legislation such as anti-replacement worker legislation. If enacted in Newfoundland and Labrador, organized labour would use this success as leverage with other provinces to advocate for similar legislation. This is a union political strategy in which individuals at the local level are being used as leverage in a national issue, potentially without their knowledge or support. The NLEC believes that this is lengthening the strike.

iii. ***International Issues:***

The globalization trend in business is forcing all unions to demonstrate to their membership and potential membership that unions are still relevant and valuable. USW representatives have spent significant time and financial resources doing so outside of Newfoundland and Labrador and Canada. The USW has made attempts to demonstrate that they have "international" clout as a trade union by holding meetings and demonstrations in Germany and the United Kingdom. The impact of visiting and demonstrating internationally has done nothing to settle the strike at Voisey's Bay. The union's focus has not been on resolving the dispute in Labrador. These competing interests have served to lengthen the dispute.

**3. Any impact this dispute may be having on other labour-management relations within the Province.**

The short-term impact on labour-management relations in this province as a direct result of this dispute has been minimal. However, the calls for anti-replacement worker legislation from third parties external to the dispute, specifically, the NL Federation of Labour and NDP politicians, have caused anxiety among unionized employers. The suggestion that any potential future labour disputes at their own operations may be used as leverage for political gain by an outside party, such as the NL Federation of Labour, is disconcerting, goes against productive labour relations and is anti-business in



its very nature. Employers fear a political decision using this dispute as leverage could result in anti-replacement worker legislation. This would significantly impact their ability to maintain operations during a labour dispute as is their right under almost all jurisdictions in North America. A political decision to ban the use of replacement workers during a labour dispute would shift the balance of power in favour of the union and serve to significantly limit the employer's ability to maintain operations. It would significantly and negatively alter the landscape of labour relations in the province.

#### **4. Ramifications of this dispute, and its costs to the province and the parties involved**

The NLEC believes that generally there will be no long-term negative impact on the labour relations climate of the province as a result of the Voisey's Bay labour dispute. Strikes are a normal and sometimes unavoidable part of the collective bargaining process. There have been hundreds of labour disputes resolved in this province following a strike. There is no reason to believe that the current labour dispute at Voisey's Bay will be any different. The only way to successfully resolve this dispute for the longer-term is to allow the parties to the dispute to find their own solution that fits their situation.

The long-term impact on the labour relations climate in this province would be exceedingly negative if a political decision was made to implement anti-replacement worker legislation or impose a settlement. Such legislation has been shown in multiple studies to increase both strike frequency and duration in the two jurisdictions where such legislation exists. These facts directly contradict the claims of organized labour and provincial NDP representatives.

In addition to the negative impact on the labour relations climate, this type of legislation would also negatively impact and the province's ability to attract and retain business investment. Such legislation creates a direct incentive for employers to set up production elsewhere. Reports from the British Columbia Business Council indicate that British Columbia's anti-replacement worker legislation is a significant reason for lost investment to other provinces such as Alberta where such a provision does not exist. A survey by the Canadian Chamber of Commerce of its members indicated 73% of respondents cited existing labour laws as a major impediment to job creation and investment in Canada. Many respondents to that survey indicated that they have relocated or were seriously considering moving some of their business outside Canada because of these types of restrictive government policies. Anti-replacement worker provisions are viewed by the employer and business investment community as anti-business.

For a full analysis of the negative impacts of anti-replacement worker legislation see the NLEC's Position Paper on this issue in Appendix A.

## CONCLUSION

The Labour dispute at the Voisey's Bay project site has unfortunately become less about getting an agreement and more about changing provincial labour relations legislation. This is not in the best interests of striking workers, the employer Vale, the labour relations environment of the province or the business attraction and retention efforts by the province.

Anti-replacement worker legislative provisions are anti-business and work against productive labour relations environments. As such, the employer community can in no way support such a recommendation in any form. This is an issue upon which the employer community can not compromise.

Labour disputes need to be resolved without third party or government intervention unless the parties agree and request such intervention and there is a significant public interest.

Unlike almost all jurisdictions in Canada, the striking employees at Voisey's Bay have no legislated option to vote in a democratic fashion on the offer that has been brought forward by the employer. Final offer vote legislation would provide this protection for them.

Striking members are not residing in one location but are dispersed across the province and the country with significant numbers employed elsewhere. The significant geographic range of these workers and the obvious challenges this represents for two way communications concerning union leadership's actions and decisions during this labour dispute, casts doubt on the claim that the majority of the striking members are still committed to the job action.

The NLEC respectfully submits that the *Industrial Inquiry Commission into the labour dispute at the Voisey's Bay project site in Labrador between Vale Newfoundland and Labrador Limited and United Steelworkers Union, Local 9508*, should focus only on local solutions to this local labour dispute and not focus on legislative change. Any suggested recommendations by the Commission for legislative change would extend to every unionized workplace in the province. The vast majority of these workplaces are not party to or impacted by the problems being experienced at Voisey's Bay. Recommended legislative change by the Industrial Inquiry Commission would carry significant political weight that could potentially have long-lasting and far-reaching unintended negative consequences to the labour relations environment and the economy of this province. Legislative change is best achieved through other processes such as the current review of our Labour Relations Act in a tri-partite process involving employers, organized labour and government.

# APPENDIX A



NLEC Position Paper

Negative Impacts of Anti-Replacement Worker Legislative Provisions

## **INTRODUCTION**

Today, labour is currently advocating for an immediate change to the Labour Relations Act to make use of replacement workers during labour disputes illegal. In 1996, a Labour Relations Working Group, which consisted of representatives of government, labour and business, recommended that there be no changes to the legislation surrounding replacement workers. This recommendation of government, business and labour was a balanced approach to the issue. The arguments put forward by labour pointing to the need for such legislation have not changed since the last review.

Studies have shown that such laws have a negative impact on the labour relations climate and the duration and frequency of work stoppages. Businesses owners have the right to operate a business freely, contracting workers who agree to the conditions offered. Approving the anti-replacement worker legislation would disrupt the balance between business and labour by giving an unfair advantage to unions in labour disputes.

Anti-replacement worker provisions have been shown to have exceeding negative impacts on labour relations and business investment, retention and attraction. Employers cannot compromise in any way on such an anti-business provision. It is fundamentally flawed. The NLEC adamantly opposes legislative provisions that would, in any way, limit or ban the use of replacement workers during strikes or lockouts. This position paper outlines the reasons why.

## **THE NEED TO MAINTAIN BALANCE OF BARGAINING POWER**

A fundamental principle of all labour relations legislation is the creation of a statutory balance in bargaining power between the parties to a collective agreement. The success of our labour relations legislation to encourage fair settlements and a harmonious labour relations environment is directly tied to this principle of statutory balance. The current regulatory framework has evolved to provide this much needed balance during labour disputes. Banning the employer's ability to use temporary replacement workers to maintain operations would significantly shift this balance in favor of the union.

A union withdraws their services during a strike, to cause economic hardship on the employer and thereby pressure the employer to move closer to the union's position in negotiations. Once a strike is initiated, the workers who have withdrawn their services access non-taxable strike pay and in many cases, look for and gain alternative employment for the period of the strike without having to give up their employment with the original employer.

Balancing these rights of the worker, the employer is provided the ability to "survive" a strike and continue to honor its legal and financial obligations. To do this, the employer must have the ability to continue to achieve some level of output. In many cases, this balance cannot be achieved unless temporary replacement workers are utilized.

Shifting the balance in power to unions would result in:

1. An inability of a business to maintain a revenue stream to pay the fixed costs of the business.

Payments on investment into capital that the business has made on such things as plant and equipment continue regardless if there is a strike or not. The business runs the risk of defaulting on loans during a strike if it is unable to generate cash flow.

2. The business becoming unable to maintain its legal/contractual obligations to customers.

If a business is unable to maintain operations, the business will lose market share to competitors. This will, in turn, impact employment levels once a settlement is reached with the striking union. The long-term growth and survival of the business in addition to the jobs of striking workers can be impacted significantly by a strike.

3. A negative impact on the general public, suppliers and contracts that rely on the business but are not a party to the labour dispute.

All businesses, to varying degrees, provide goods and services that are needed by the general public and/or other businesses. The inability of a business to provide goods and services such as food or transportation could have significant ramifications on the health and safety of many private citizens in both urban and rural environments in the province. It is generally recognized that the impact on private citizens in rural areas is intensified as the ability to use the business's competitors is typically limited or non-existent.

As for the impact on suppliers, their ability to maintain employment levels and survive the work stoppage could be significantly impaired if the employer involved in the dispute was unable to maintain operations.

A third way those not party to the labour dispute can be negatively affected is through specialized supply chains. Some industries have highly specialized supply chains that are not easily substituted with other suppliers. A disruption in a one element can cause the entire supply chain to collapse. This is especially true in rural areas of the province.

4. A negative impact on non-unionized workers and workers from other unions at the workplace that are not on strike

In workplaces with multiple unions, the inability to use replacements to maintain operations can place the employer in a position where they have no choice but to layoff the members of other unions in the workplace that are not involved in the labour dispute. This would significantly impact the lives of the other union workers who have no part in the dispute. In addition, non-unionized workers, including management and supervisory employees may also be laid off and have to deal with the same financial challenges.

All strikes cause economic hardship on a business, the degree of which varies across industries and between businesses. During strikes management must spend time not only filling the jobs of striking workers but also managing the issue of the strike itself. Add to this, tactics employed by some unions against the remaining workers, which at best impairs the productivity and at worst can create workplace hazards and you can have significant economic hardship even without the use of replacements.

Many employers simply cannot meet these three essentials noted above without the use of temporary replacement workers.

A ban on replacement workers creates a one-sided bargaining system in which a union can effectively choose to shut down an employer's operation and inflict loss on that employer and those who depend on that employer, including workers from different unions in the same workplace, indefinitely, regardless of the reasonableness of its demands.

## **WHY MANAGEMENT CAN'T DO IT ALONE**

Proponents of anti-replacement worker legislation will often cite the fact that most employers involved in a labour disputes do not employ temporary replacement workers but are still able to meet the business's obligations through the use of management and non-unionized staff. While it is true that the use of temporary replacement workers does not happen in every strike, in many cases it is not practical or possible for the employer to operate without the additional hires.

The evolution of the workplace and improved productivity from growth in the use of technology has lead to a reduction in the number of management personnel. During labour disputes of the 60s and 70s businesses could rely on a much larger number of managers to survive a strike. In addition, the evolution of 'Just in Time' manufacturing and transportation systems has made it impossible for many businesses to stockpile raw materials and other supplies in order to survive a strike. This is especially true on the island portion of the province with the enhanced delivery challenges of Marine Atlantic. Businesses that rely on perishable goods to do business can't stockpile anything long-term. The increased specialization of some positions also makes operating challenging without the utilization of external expertise. Some managers simply do not have the technical skills or the actual license to perform the duties of striking workers.

In some sectors, the additional temporary personnel are required to assure continued employee and public health and safety and that environmental standards are preserved and protected during a labour strike.

Numbers on the frequency of the use of temporary replacement workers during labour disputes in Newfoundland and Labrador is unavailable as the Labour Relations Agency does not track the

numbers. However, we know at the federal level, employers use temporary replacement workers to survive strikes about 25% of the time.

The legal ability of the employer to plan for and use replacement workers can be an important consideration for collective bargaining strategies. Both unions and employers modify their behavior depending on their ability or lack of ability to operate with temporary replacement workers. In this sense, it is not the actual use, but the possibility of use and the perceived ability of the employer to use temporary replacements that is important to the balance of bargaining power.

## **ANTI-REPLACEMENT WORKER LEGISLATION ON STRIKE FREQUENCY, DURATION AND SETTLEMENT**

Proponents of anti-temporary replacement worker legislation often state that research shows that the incidence, duration or results of labour disputes are affected positively by such legislation. However, the NLEC has not seen such research and as such we are unable to validate such findings.

The reality is, because such legislation represents such a marked departure from the principle of balanced bargaining power on which almost all labour relations legislation depends, there are few jurisdictions where the impact can be measured. However, the research that does exist in these jurisdictions is clear in its conclusions: jurisdictions that have anti-replacement worker legislation experience both an increase in strike frequency and duration.

In a study prepared in the late 1980's entitled, *"Strategic Bargaining Models and Interpretations of Strike Data"*, J. Kennan and R. Wilson (1989), argue that since strikes are often used to resolve uncertainty and elicit information, a legislative ban on replacement workers increases strike incidence and duration because it increases unions' uncertainty about firms' willingness to pay to end strikes, since that willingness is no longer constrained by the option to use replacement workers. Kennan and Wilson (1989) later confirmed the study by using the results of research conducted by Morley Gunderson and Angelo Melino (1990), *"The Effects of Public Policy on Strike Duration"*. Gunderson and Melino (1990) estimated that Quebec's law prohibiting firms from hiring replacement workers during a strike increases average strike duration by over 20 working days, as compared to a median duration of 36 working days.

In studies conducted during the 1990's, it was identified that anti-replacement worker legislation directly impacted strike frequency and duration. Peter Cramton, Morley Gunderson and Joseph Tracy (1999), conducted a study entitled *"The Effect of Collective Bargaining Legislation on Strikes and Wages"* and it affirmed that anti-replacement measures have generally had the effect of increasing the probability of a strike occurring, from 15% to 27%, during the periods of 1967 to 1993. (Cramton et al., 1999) examined 4,340 contracts negotiated at large private-sector companies in Canada from January 1967 to March 1993. The results revealed that the average duration of a strike is 86 days if the hiring of replacement workers was forbidden and 54 days in the absence of such measures.

Anti-replacement worker laws were thus associated with a 32-day average increase in the duration of strikes. Moreover, the prohibition of replacement workers was cited as the most important variable considered in relation to strikes.

In a more recent study, Benjamin Dachis and Robert Hebdon (2010), *“The Laws of Unintended Consequence: the Effect of Labour Legislation on Wages and Strikes”*, also concluded that a ban on temporary replacement workers increased the average length of strikes. Dachis and Hebdon (2010) conducted a test on the effect of anti-replacement worker legislation on strikes, preparing an analysis of the number of strikes per month in a province and the number of strikes per firm. The research identified the use of banning temporary replacement workers increased strikes by 0.11 per month per province, and increased strike incidence of about 15 percent.

The results from Dachis and Hebdon’s (2010) study support finding in, *“The Impact of Anti-Temporary Replacement Legislation on Work Stoppages: Empirical Evidence from Canada”*, written by Paul Duffy and Susan Johnson (2009). Duffy and Johnson concluded that bans on temporary replacement workers significantly increased the likelihood of strikes. Duffy and Johnson (2009) used annual province-level data from all businesses in the private, non-construction sectors from 1978 to 2003 for nine provinces and performed cross-sectional time-series analysis to estimate the impact of anti-replacement legislation on work stoppages. The results from the research indicated that anti-replacement legislation increased the number of work stoppages.

Research conducted over a 40-year study time period (1967-2008), demonstrates conclusively that temporary replacement bans have increased average strike incidence and duration in the two jurisdictions in North America where it exists (see Table #1, Page 9). The reasons for increased duration and frequency of strike action all stem from the imbalance that is created by anti-replacement worker legislation. Such a provision removes much of the “fear” or risk of going on strike thereby making a strike more likely. If the employer is unable to operate without the use of temporary replacement workers, then the union is more likely to strike to gain access to the greater bargaining leverage created by that strike. The “bigger the stick” one party has in collective bargaining the more likely that party is to use it.

In terms of duration, because there is an advantage provided to the union by virtue of the employer’s inability to utilize temporary replacement workers to survive a strike, the demands of the union during bargaining become greater. This pushes the two sides further apart in their positions leading to a lengthening of the strike. The party with the “bigger stick” in collective bargaining will have the bigger demands, the further apart the positions will be and the longer the strike will take to resolve.

Clearly, the legislative bans on the use of temporary replacement workers have a wide range of effects that must be considered in any discussion to impose such a regulation. Bans do not reduce strike activity; in fact, the opposite is the case. The preponderance of evidence from independent sources clearly demonstrates that a ban on replacement workers increases both the incidence and duration of strikes.



## **TABLE #1**

**1989-2010:**

**Estimates of the effects of anti-replacement measures on the frequency/ length of strikes**

Study	Sample	Increase Duration	Increase Frequency	Duration (average number of strike days)		Frequency (probability of talks ending in a strike)	
				With anti-replacement laws	Without anti-replacement laws	With anti-replacement laws	Without anti-replacement laws
Kennan & Wilson (1989)		Confirmed	Confirmed	42**	35	24%	
Gunderson & Melino (1990)	7, 546 strikes in the private sector (1997 to 1985)	Confirmed	Confirmed	42**	35	24%	
Cramton, Gunderson, & Tracy (1999)	4,340 contracts negotiated at Canadian private-sector businesses with 500 workers or more (1967-1993)	Confirmed	Confirmed	86**	54	27%**	15%
Dachis & Hebdon (2009)	Prepared analysis strikes per month in a province/ per firm	Confirmed	Confirmed	N/A	N/A	15%	N/A
Duffy & Johnson (2010)	Annual province-level data from 1978-2003	Confirmed	Confirmed	N/A	N/A	15%	N/A

\*Statistically significant at a 90% confidence level.

\*\* Statistically significant at a 95% confidence level

## ANTI- REPLACEMENT WORKER PROVISIONS ON VIOLENCE AND MORALE

One argument advanced in favor of anti-replacement worker legislation is the need to avoid violent incidents that can arise when replacement workers attempt to cross picket lines set up by striking workers. Such arguments are disingenuous. Violence is connected with the strike and the picket line, particularly mass picketing, rather than with the employer's right to continue operations with the use of temporary replacements. If the real concern is reduction in violence, then there should be tighter restrictions and greater enforcement of laws intended to deter such violence.

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 condition 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.<sup>1</sup>*

If the true intent of anti-replacement worker legislation advocates were to prevent violence on picket lines then such an objective can be secured through the proven strategies of our existing labour relations climate. It is the inadequately regulated picket line / lack of picket line management by the union leadership 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 our efforts to prevent violence. Securing a stronger presence of law enforcement on picket lines and limiting the numbers of picketers on the line at one time (through legislative means or court injunctions) are both successful strategies utilized on regular basis.

Support for this argument comes from an Ontario Ministry of Labour study, "Replacement of Striking Workers During Work Stoppages in 1991"<sup>2</sup> which examined each of 94 work stoppages that occurred in Ontario in 1991. The study's findings show 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 of violence emerges that would indicate anything other than the picket line or strike itself as contributing to the occurrence of violence.

To restrain the employer's legal option of using temporary replacement workers to survive a strike because those on strike may become violent would be a case of punishing the victim and not the perpetrator. There is never an excuse for violence on picket lines.

The employer's attempts to survive the economic hardship of a strike will always be met with emotion and anger on the part of some workers. Just as workers picketing at the private residences of managers, corporate directors, or the property of customers and suppliers will always be associated with emotion on management's side. Such reactions must be viewed as necessary evils. They are weapons that have proven time and time again to facilitate the successful resolution of labour disputes.

One of the other arguments put forward by proponents of anti-replacement worker legislation is the negative impact on the morale of striking workers and the long-term labour relations climate of the business.

Employers should not be penalized for using replacement workers to try and ensure the business survives a strike. Low morale is more closely related to the length of strike. Longer strikes typically have a larger negative impact on the morale of both workers and employers. The longer the strike, the more likely it is for the business to need to employ temporary replacement workers. If the true reason for banning replacement workers is to protect employee morale, then it seems counterproductive to advocate for a provision that will increase both frequency and duration of strikes.

Strikes are a form of emotionally charged coercion. They will always be associated with impacts on the morale of workplace parties. The longer term impacts on the labour relations climate of the business are; however, questionable. Unions and employers have been operating successfully following strikes since the first strike was settled. Strikes sometimes have a positive effect on the labour relations climate by bringing to head disagreements, forcing settlements and "clearing the air" so to speak.

## **THE LACK OF ANTI-REPLACEMENT WORKER PROVISIONS IN OTHER JURISDICTIONS**

In Canadian jurisdictions and around the world, anti-replacement worker provisions are the exception, not the rule. Legislatures in every province and at the federal level have debated the arguments for and against anti-temporary replacement worker legislation as far back as the 1960s. In 1977 and 1983, the Province of Quebec modified its labour code to limit radically, this traditional right of employers, but this radical approach was not followed by the vast majority of other Canadian provinces (only British Columbia currently has similar legislation). All the other jurisdictions recognize the right of employers to protect property rights and meet obligations to creditors, suppliers and customers through the use of replacement workers. The direction of

legislators in Canada has been overwhelming toward balanced collective bargaining power. As one example of this, the Province of Ontario enacted such an anti-replacement worker provision in 1993 but repealed it just three years later. A private members bill designed to re-introduce the provision in the Ontario legislature was defeated as recently as October 8<sup>th</sup>, 2009.

Bill-386, a federal bill to ban replacement workers in the event of a labour dispute, was defeated in the House of Commons on October 21, 2010 by a vote of 153 to 113. The NLEC has been lobbying the federal government through strong representation to provincial Members of Parliament to explain their concerns with this piece of legislation. At the federal level, this is the 14<sup>th</sup> proposed motion or bill for anti-replacement worker legislation that the federal government has defeated since 2000. Most have been sponsored by the Bloc Quebecois and the NDP. None have received the approval of the Parliament of Canada.

Quebec and British Columbia would appear to have the distinction of being the only jurisdictions in North America which restricts the employer's right to keep its business operating with replacements. The defeat of such legislation for the 14<sup>th</sup> time at a federal level further supports the NLEC's position that anti-replacement worker legislation is bad for the labour relations climate in this province.

## **ADVERSE IMPACT ON PROVINCIAL COMPETITIVENESS**

Historically, Newfoundland and Labrador has had the reputation of having a poor labour relations climate. Anti-replacement worker provisions would further this perception. The reality is an anti-replacement worker provision in our labour relations legislation would create a direct incentive for employers to seek more secure sources of production elsewhere.

An illustration of how significant labour relations legislation can be in such matters comes from the Canadian Chamber of Commerce. A survey of their members indicated that 73% of respondents cited existing labour laws as a major impediment to job creation and investment in Canada. Many respondents of that 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.

Reports from the British Columbia Business Council (a jurisdiction where anti-replacement worker legislation exists) show that their anti-replacement worker legislative provision is a significant reason for lost investment to other provinces such as Alberta where such provisions do not exist. When the BC Business Council surveyed its members about what legislative changes members would like to see, the removal of the prohibition on temporary replacement workers tops the list.

In Quebec, the Canadian Chamber of Commerce reports that, while anecdotal, Quebec employer representatives 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 alternative 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. The Quebec experience has been described as “not promoting industrial stability, nor industrial growth”.

The employer communities of both BC and Quebec continue to aggressively lobby their respective governments to follow Ontario’s lead and revoke anti-replacement worker provisions.

It is interesting to note that the NDP governments of both Saskatchewan and Manitoba have rejected requests from the labour movement for replacement worker legislation. The reason given -- it would discourage new investment and job creation.

The province’s businesses are being asked to compete in an increasingly competitive global environment. Our provincial legislation must not “hand cuff” the employer’s ability to be competitive, gain and maintain market share.

## **CONCLUSION**

From a strictly economic point of view, radically altering our labour relations legislation away from the rest of North America and toward the thirty years of the numerous negative impacts experienced in Quebec and British Columbia seems an absurd proposal. Maintaining our labour competitiveness and productivity as a province will become more, not less, important as the province competes more and more in a global environment.

In almost all jurisdictions in North America, including all of Atlantic Canada, labour relations legislation is about balanced bargaining power of workplace parties. No one, employer or union, can dispute that this approach has been exceptionally successful in decreasing work stoppages. As just one example, according to Human Resources Development Canada data, in 1976 there were 1040 work stoppages resulting in 11,544,170 days not worked. In 2009, there were 19 work stoppages resulting in 1,402,520 days not worked.

Our labour relations legislation has evolved since the labour unrest of the 1970s and employers (including government) and unions have learned to work within this framework of a balanced approach to bargaining power. A change in the “rules of the game” at this point in time would significantly erode the gains that have been made as a result of our past mistakes.

Anti-replacement worker provisions have been shown to INCREASE strike frequency and duration and have no effect on the incident of violence on picket lines. Labour’s demands for a ban on replacement workers must be seen as a demand for more bargaining power at the expense of a competitive provincial labour relations climate.

Anti-replacement worker provisions have been shown to have exceeding negative impacts on labour relations and business investment, retention and attraction. Employers cannot compromise in any way on such an anti-business provision. It is fundamentally flawed. The NLEC adamantly opposes legislative provisions that would, in any way, limit or ban the use of replacement workers during strikes or lockouts.

## REFERENCES

Cramton, P., M. Gunderson, and J. Tracy. 1999a. "The Effect of Collective Bargaining Legislation on Strikes and Wages." *Review of Economics and Statistics* 81 (3): 473–87.

Dachis, B., and R. Hebdon. 2010. "The Laws of Unintended Consequence: The Effect of Labour Legislation on Wages and Strikes." C.D. Howe Institute Commentary, C.D. Howe Institute, issue 304, June 2010.

Duffy, P., and S. Johnson. 2009. "The Impact of Anti-Temporary Replacement Legislation on Work Stoppages: Empirical Evidence from Canada." *Canadian Public Policy*, issue 35.

Gunderson, M., and A. Melino. 1990. "The Effects of Public Policy on Strike Duration." *Journal of Labor Economics* 8 (July): 296–316.

Haywood, L. 1992. "Replacement of Striking Workers during Work Stoppages in 1991." Toronto: Ontario Ministry of Labour.

Kennan, J., and R. Wilson. 1989. "Strategic Bargaining Models and Interpretation of strike Data." *Journal of Applied Econometrics* 4 (December Supplement): S87–S130.

Report of the Royal Commission Inquiry into Labour Disputes, 1968, p. 29.

Woods Report on Canadian Industrial Relations (1969: CCH Canadian Limited, Don Mills).

# APPENDIX B



NLEC Position Paper

Final Offer Vote Statutory Provisions in Newfoundland and Labrador

## OVERVIEW

Most jurisdictions in Canada have provisions in their labour relations legislation that provide for the final offer of the employer in contract negotiations to be put to a vote by the workers. It is the position of the Newfoundland and Labrador Employers' Council that the employer should be able to apply for a vote of the workers on the final offer of the employer. The NLEC believes this would help reduce the frequency and duration of strikes in the province, as well as provide for an improved labour relations climate.

## WHY FINAL OFFER VOTE PROVISIONS WORK

Legislation providing for a final offer vote allows the employer to request that the bargaining unit vote, in a secret ballot, on the Employer's final offer. Jurisdictions that have final offer vote provisions report that, while the provision is not used in every labour dispute or contract negotiation, it does provide another tool that can be exceedingly helpful in settling difficult negotiations.

Although collective agreements are negotiated by employers and unions, the employees whose terms and conditions of employment are reflected in these collective agreements, are most directly impacted by the outcome of negotiations.

Legislation providing for a final offer vote can prevent a work stoppage or a protracted strike and . It is one of a number of mechanisms that may allow parties to reach an agreement and, in some situations, prevent a work stoppage (for example, following a protracted strike or where a gap exists between expectations of the union leadership and bargaining unit members).

An employer's final offer may be significantly different from the employer's offer voted on by the members of the bargaining unit for a strike vote. This could be the case for a variety of reasons, including changing economic conditions. However, in the absence of legislation providing for a final offer vote, there is no mechanism to ensure that bargaining unit members have an opportunity to vote on the Employer's last offer which has been modified since the strike vote.

Legislation providing for a strike vote and a final offer vote ensures that all members of the bargaining unit (whether or not they are union members) have a voice in these critical decisions.

Final offer vote provisions place the ultimate choice in the hands of those most impacted by the decision to strike after they have been fully informed of the employer's offer that is, the bargaining unit.

The inclusion of legislation providing for a final offer vote in most Canadian jurisdictions reflects the importance of a final offer vote as a valuable mechanism for resolving labour disputes in Canada.



## **FREQUENCY OF FINAL OFFER VOTES IN OTHER JURISDICTIONS**

Over the last decade, work disruptions have been averted or shortened by virtue of a final offer vote. There are numerous examples of such occurrences across jurisdictions. For example, Alberta completed 18 Final Offer Votes between April 1, 2004 and May 13, 2009, 22% of which were accepted. In British Columbia, between January 1, 2007 and December 31, 2008, 36% of final offer votes were accepted. Finally, in Ontario, approximately 33% of final offer votes are accepted.

## **RECOMMENDATIONS FOR A FINAL OFFER VOTE PROVISION**

1. The NLEC recommends that Government amend the Labour Relations Act to include a provision for final offer votes.
2. The Employer may make an application to the Chair of the Labour Relations Board for a Final Offer Vote. The Employer's request to the Minister shall include the Employer's last offer. The Employer may make more than one request for a final offer vote during a labour dispute or negotiation.
3. The Employer shall be permitted to make a request to the Chair of the Labour Relations Board in each set of negotiations.
4. The Chair of the Labour Relations Board shall order a Final Offer Vote within five (5) business days from the time received by the Minister.
5. The Final Offer Vote shall be conducted by the Labour Relations Board, which shall be a secret vote supervised by the Labour Relations Board. The vote will be decided by the majority of votes cast.





