NEGATIVE IMPACTS OF ANTI-REPLACEMENT WORKER LEGISLATIVE PROVISIONS

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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 Once a strike is initiated, the workers who have withdrawn their services access non-taxable strike pay and in many cases, look for and gain alternative employment for the period of the strike without having to give up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.* [i]

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" [ii] 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 8th, 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 14th 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 14th 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 completive 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.

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